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Filed Clerk of the
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State Commission on Judicial Conduct

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Via E-Mail

Mr. John J. (Mike) McKetta III
Graves Dougherty Hearon & Moody
401 Congress Avenue, Suite 2200
Austin, Texas 78701

Date 8/14/09 In Re Judge No. 96.
By Daniel Thompson

Re: *The Honorable Sharon Keller*

Dear Mike:

Enclosed please find Respondent's Trial Brief, which is being filed with the Commission today. A copy of this document is being delivered to Judge Berchelmann.

Should you have any questions regarding the above, please do not hesitate to contact me.

Very truly yours,

Kurt Schwarz

KAS
Enclosures

cc: Seana Willing *Via E-mail*
The State Commission on Judicial Conduct
P.O. Box 12265
Austin, Texas 78711-2265



FILED

Clerk of the Commission

INQUIRY CONCERNING JUDGE,
NO. 96

Date 8/14/09 In Re Judge No. 96
BY Charles Longpa

IN RE:
HONORABLE SHARON KELLER,
PRESIDING JUDGE OF THE TEXAS
COURT OF CRIMINAL APPEALS,
AUSTIN, TRAVIS COUNTY, TEXAS

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BEFORE THE
COMMISSION ON
JUDICIAL CONDUCT

COPY

THE HONORABLE SHARON KELLER'S TRIAL BRIEF

TO SPECIAL MASTER, THE HONORABLE DAVID J. BERCHELMANN, JR.:

Respondent, the Honorable Sharon Keller (hereafter "Respondent" or "Judge Keller") respectfully files this, her Trial Brief.

I.
INTRODUCTION

This formal proceeding arises out of the execution of Michael Wayne Richard on September 25, 2007, for the 1986 rape and murder of Marguerite Dixon, a mother of 7 whose grave misfortune was owning a couple of television sets and a van coveted by Mr. Richard. Mr. Richard had two trials, both resulting in capital murder convictions; two sets of unsuccessful appeals; and multiple habeas corpus proceedings. More than two decades after committing his brutal crime he was scheduled to be executed on September 25, 2007.

On that morning, the United States Supreme Court granted a writ of certiorari in *Baze v. Rees*, a case out of Kentucky challenging a lethal injection protocol which is substantially identical to the lethal injection protocol employed by the State of Texas. Mr. Richard's lawyers at the Texas Defender Service ("TDS") intended to postpone Mr. Richard's execution by drafting a motion for a stay, a motion for leave to file a petition for a writ of prohibition, the petition itself, and a successive writ of habeas corpus based on *Baze*, purportedly to be filed in

the Texas Court of Criminal Appeals (“CCA”), *but they never filed those documents with the CCA – in fact, they never finished drafting the pleadings.*¹ Mr. Richard was executed the night of September 25, 2007, after the United States Supreme Court denied two last-minute requests for a stay of execution.

By this formal proceeding, unprecedented in Texas history, Seana Willing, the Executive Director and Examiner of the State Commission on Judicial Conduct (“Commission”), seeks the removal from office of Respondent, the Honorable Sharon Keller, Presiding Judge of the CCA, because Mr. Richard’s lawyers never filed a request for a stay of execution with the CCA. That is – and it is important to be clear about this fact – *the Examiner seeks Respondent’s removal from elected office because Mr. Richard’s lawyers failed to do their jobs.* On this score the facts are undisputed: it is undisputed that Mr. Richard’s attorneys did not file any document with the CCA on September 25, 2007, and no amount of sophistry by the Examiner or Richard’s lawyers can change the fact the Mr. Richard’s counsel did not present any plea for a stay of execution to the CCA on September 25, 2007, by the means available to them under the Texas Rules of Appellate Procedure. *See* Tex. R. App. P. 9.2. Indeed, they now profess they were unaware the rule existed, even though TDS had used that procedure previously. It is also undisputed that not one of Mr. Richard’s lawyers ever bothered to pick up a phone and call the CCA or its General Counsel, despite the fact that Richard’s lead counsel, Greg Wiercioch, knew that the General Counsel had a policy of accepting late filings.

The facts are disturbing, but they are the facts: Mr. Richard’s lawyers not only failed to file anything with the CCA, they delegated all communications with the deputy clerk of the CCA to their runner and receptionist. No fewer than three lawyers were representing Mr. Richard on

¹ The motion for leave to file the petition for a writ of prohibition was never completed, even though it is a prerequisite to such a petition, and the writ of habeas corpus was abandoned.

September 25, and at least two others were consulted on his behalf that day, all but one of whom were experienced death-penalty litigators, and *they all failed Mr. Richard*. Instead, one of his lawyers, University of Houston Law Center Professor David Dow, conveniently elected to blame Respondent for Mr. Richard's allegedly premature execution, publishing false and derogatory articles in the *Washington Post* and *Houston Chronicle*, and providing interviews with publications like the *Dallas Morning News*, the *Austin American-Statesman*, and the *New York Times*, where he spun a simple story: a "series of computer crashes" prevented a timely filing which would have been only "15 minutes late," but despite the lawyers "pleading for more time," Judge Keller refused to allow the filing. Prof. Dow's story is a string of lies. Ignoring and distorting the facts of September 25, 2007, Prof. Dow ignited a conflagration of media condemnation of Judge Keller which has led to this formal proceeding.

Respondent, first elected to the CCA by the citizens of the State of Texas in 1994 and most recently elected to her position in 2006, is not accused of violating any law, state or federal – in fact, allegations of federal civil rights violations (based on the same allegations made by the Examiner here) were summarily dismissed by the United States District Court for the Western District of Texas – nor is she accused of abusing her office in any way. The Examiner seeks to deny the citizens of Texas the services of their duly elected Presiding Judge for two simple, although baseless, reasons: First, Respondent allegedly did not follow an oral tradition of the CCA – an unwritten understanding among CCA personnel that communications concerning an execution be directed to the CCA judge assigned to handle the execution (for Mr. Richard, Judge Cheryl Johnson) – even though the CCA's General Counsel, Edward Marty, has testified that *he* told Judge Johnson about the phone call from Richard's lawyers. Second, Respondent failed to keep the CCA's clerk's office open after 5:00 p.m., notwithstanding the facts that: (1) Mr.

Richard's lawyers could have (as they had previously) filed papers after 5:00 p.m. simply by delivering them to a CCA judge or General Counsel (and at least three CCA judges and the General Counsel were at the court on the evening of September 25, 2007, and willing to accept the filings), and (2) the clerk's office had closed at its statutorily prescribed time of 5:00 p.m. for many years on execution days.

There is absolutely no basis for discipline of any sort to be imposed upon Judge Keller. Mr. Richard was ill served by his lawyers, who, justly ashamed of their conduct on September 25, 2007, generated a publicity campaign based on half-truths and flat-out lies to shift the blame from their incompetence to Judge Keller. The fact that this formal proceeding was prompted by such shoddy conduct itself shows that, honestly considered in light of the facts, this proceeding can only fairly be described as a degradation ceremony. The fact that Judge Keller did absolutely nothing wrong on September 25, 2007, demands that all charges against her be dismissed and that she be publicly exonerated.

II. FACTS

The following facts have been disclosed during discovery in this proceeding, and will be proved at trial.

A. EVENTS LEADING UP TO SEPTEMBER 25, 2007.

On the afternoon of August 18, 1986, and just two months after he had been paroled from prison, Michael Wayne Richard approached Marguerite Dixon's son, Albert, in front of the Dixon home in Hockley, Texas. When Albert and his sister, Paula, left a few minutes later, Richard returned and entered the house. He took two television sets, sexually assaulted Mrs. Dixon, and shot her in the head with an automatic pistol. He then fled in her van.

Richard was apprehended by the police and confessed to Mrs. Dixon's murder. He was indicted by a Harris County Grand Jury for capital murder on October 29, 1986. On September 4, 1987, Richard was found guilty of capital murder and sentenced to death. Five years later the Texas Court of Criminal Appeals reversed Richard's conviction because of a flaw in the jury instructions.

Richard's second trial began in May of 1995. Again, the jury found him guilty of capital murder and he was sentenced to death. The Texas Court of Criminal Appeals affirmed the conviction and sentence on direct appeal on June 18, 1997, and the United States Supreme Court declined to review his case.

In 1998, Richard filed an application for a writ of habeas corpus in Harris County District Court. The District Court recommended that the writ be denied. The District Court's recommendation was accepted by the Texas Court of Criminal Appeals. His state habeas corpus writ was denied by the Texas Court of Criminal Appeals on February 7, 2001. Richard next filed a federal petition for writ of habeas corpus which was denied by the United States District Court in Houston on December 31, 2002. On June 27, 2003, the United States Court of Appeals for the Fifth Circuit affirmed the District Court and refused Richard's request to further appeal.

Richard then filed another state application for a writ of habeas corpus claiming ineligibility for execution based on mental retardation – a so-called *Atkins* claim. The Texas Court of Criminal Appeals sent this claim to the trial court for resolution and the State District Judge recommended that the claim be denied. On March 21, 2007, the Texas Court of Criminal Appeals denied, by a vote of 8-1, Richard's second state habeas corpus application.

Richard then attempted to file another habeas corpus petition in federal court claiming ineligibility for execution based on mental retardation – another *Atkins* claim – but the Fifth Circuit denied that motion on May 15, 2007.

On June 12, 2007, the Harris County District Court set Richard's execution date for September 25, 2007. On September 17, 2007, the TDS, on Richard's behalf, filed a motion for authorization to file successive petitions for writ of habeas corpus with the Fifth Circuit on the same grounds (mental retardation) that the Court had previously denied on May 15, 2007. On the cover of the Motion filed in the Fifth Circuit, TDS wrote in bold letters: "**THIS IS A DEATH PENALTY CASE. MICHAEL WAYNE RICHARD IS SCHEDULED TO BE EXECUTED ON SEPTEMBER 25, 2007.**"

TDS's motion in the Fifth Circuit was 43 pages long. It attached a proposed petition for writ of habeas corpus which (with attachments) was 240 pages long. Nowhere in the motion or the attached "Proposed Petition" did Richard claim that Texas' method of lethal injection was unconstitutional. In fact, in over 20 years of litigation Richard never once made that claim until September 25, 2007.

Richard did not file any pleading in the Texas Court of Criminal Appeals between June 12, 2007, (the date his execution date was set) and September 25, 2007 (the date he was executed). By the time he was executed Richard had two trials, two direct appeals (including to the United States Supreme Court), two state habeas corpus proceedings and three federal habeas corpus hearings or motions.

B. THE EVENTS OF SEPTEMBER 25, 2007.

At 9:00 a.m., Central Time, on Tuesday, September 25, 2007, the United States Supreme Court granted a writ of certiorari in a case called *Baze v. Rees*. *Baze* involved a challenge to the

constitutionality of the lethal injection protocol used in executions in Kentucky. The lethal injection protocol used in Texas executions was substantially the same as that used in Kentucky. Mr. Greg Wiercioch, Mr. Richard's lead attorney at TDS, found out about the *Baze* decision at 9:30 a.m.; Prof. Dow, the Executive Director of TDS, learned of *Baze* a half hour later.

The designated judge in charge of Mr. Richard's execution was the Honorable Judge Cheryl Johnson; she had been selected as the designated judge by CCA General Counsel Edward Marty. At 11:29 a.m. Mr. Marty sent an e-mail to all of the CCA judges with the subject line, "Execution Schedule." In the e-mail Mr. Marty informed the CCA judges, including Judge Keller, that "[t]he Supreme Court has just granted cert on two Kentucky cases in which lethal injection was claimed to be cruel and unusual . . . I do not know if Michael Wayne Richard will try to stay his execution for tonight over this issue or in what court."

Mr. Richard's lawyers did not discuss the possible significance of *Baze* on Mr. Richard's case until a 11:40 a.m. conference call. The call ended at noon, at which time TDS lawyer Alma Lagarda, who had been licensed to practice law for less than a year, was assigned the task of drafting a writ of prohibition (something she had never done), a motion for leave to file the writ, a successor application for writ of habeas corpus, and a motion to stay the execution. She was the only lawyer working on the Richard matter in the TDS office until Prof. Dow arrived at 2:45 p.m. Mr. Wiercioch, Mr. Richard's lead attorney, never worked on the lethal injection claim, as he claimed to be busy responding to the State's *Atkins* brief which he received at 11:31 a.m.

Ms. Lagarda started drafting the petition for a writ of prohibition at 12:00 to 12:15 p.m. While she was working on the petition, TDS contacted the Harris County District Attorney's office and informed them that Richard would be filing papers, including a writ of habeas corpus, that afternoon based on *Baze*. The Harris County D.A.'s office informed Mr. Marty of the call,

who in turn informed all of the CCA judges. The only reason for TDS to call the Harris County D.A. would be if the papers were to be filed in the trial court, and a writ of habeas corpus must, per statute, be filed with the trial court.

In any event, Ms. Lagarda delivered her draft of the petition to Prof. Dow at 3:30. At that time, she had not started to draft a motion to stay Richard's execution, nor had anyone else in the TDS office. She never did (Dow started drafting the motion at 4:45 p.m.), nor did she draft the habeas corpus writ (at 3:30 p.m. Dow told her not to bother), and she never drafted the motion for leave to file the writ of prohibition. No one else did, either. As a consequence, Prof. Dow reviewed the draft of the writ of prohibition and made changes to it and returned it to Ms. Lagarda at 4:00 p.m. Ms. Lagarda input the changes and had her final version done at 4:30 p.m.

At roughly 4:40 p.m., Prof. Dow forwarded his final edits to the writ of prohibition and began to draft the motion for stay. He told Ms. Lagarda to call someone to tell the CCA that a petition was going to be filed late – that is, after the CCA Clerk's office closed at 5:00 p.m. Ms. Lagarda called Liz Waters, a receptionist in TDS's Austin office, who in turn called Rindy Fox, a TDS runner. Ms. Fox phoned the deputy clerk of the CCA, Abel Acosta, between 4:40 and 4:45 p.m. She was in her car and speaking from her cell phone. She asked if the clerk's office could stay open beyond 5:00 p.m. Mr. Acosta replied "No," but he said he would check.

As of September 25, 2007, the Clerk's office had never stayed open beyond 5:00 p.m. on execution day, but that does not mean that after-hour filings were not allowed. Indeed, TDS, in another death penalty case, on the day of execution, filed a motion to stay with the Texas Court of Criminal Appeals after hours. This procedure is expressly authorized by Rule 9.2(a)(2) of the Texas Rules of Appellate Procedure which states:

(a) A document is filed in an appellate court by delivering it to:

(1) the clerk of the court in which the document is to be filed; or

(2) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk.

The Judges of the CCA's phone numbers at the Court are, and were on September 25, 2007, all listed in the blue pages of the Austin phone book. The telephone number of the CCA's General Counsel, Ed Marty, also was listed in the phone book, and was on his letterhead, and known to TDS. Judge Johnson, General Counsel Edward Marty, and several other members of the Court were at the CCA after hours on September 25, 2007, and were willing to accept filings. Judge Johnson left "shortly before," but Mr. Marty stayed until after Mr. Richard was executed. Two other judges also were present at the CCA after 5:00 p.m.

Sometime shortly before 5:00 p.m., Mr. Acosta relayed Ms. Fox's request about keeping the clerk's office open to Mr. Marty, who then called Judge Keller at home to ask a question about closing time, which she understood to refer to whether the Clerk's office stayed open past 5:00 p.m. Her answer was "No," which had been the practice of the court on other execution days all during Judge Keller's tenure with the court. Mr. Marty confirmed that he had already advised the deputy clerk that the Clerk's office would close at 5:00 p.m. but just wanted to check with her. Judge Keller did not, and could not have, if she had wanted to, close access to the court in light of TRAP Rule 9.2(a), a fact known to TDS. In fact, the CCA courthouse remains accessible well after 5:00 p.m.

Judge Keller was not told by Mr. Marty (the only person she spoke with about this matter on September 25, 2007) that TDS was having computer problems. In any event, it did not take a computer to prepare and timely file a document requesting a stay of execution; it could have been hand-written and the court would have accepted it, as Judge Keller informed the Commission, or Mr. Richard's lawyers could have filed an application for a writ habeas corpus

in the trial court pursuant to Article 11.071, Section 5 of the Texas Code of Criminal Procedure. In addition, Richard's lawyers could have filed a motion to withdraw the execution date with the trial court, pursuant to article 43.141(d) of the Texas Code of Criminal Procedure.

Following his conversation with Respondent, Mr. Marty told Mr. Acosta he was advised by Judge Keller that the Clerk's office did not need to stay open. Mr. Acosta called Ms. Fox at approximately 4:48 p.m. and told her that the Clerk's office would close at 5:00; she told Mr. Acosta that she would take the filing to the Court and drop it with a security guard. Mr. Acosta replied that she was free to do so. Mr. Richard's lawyers never filed anything with the CCA.

At approximately 5:00 p.m., Mr. Marty informed Judge Johnson – the Judge assigned to take charge of all issues relating to Mr. Richard's execution – about the call from Mr. Richard's lawyers asking that the Clerk's office remain open after 5:00 p.m. Judge Johnson therefore knew both about the call from the Harris County D.A.'s office about a filing by Richard's lawyers, and about the call from TDS about keeping the Clerk's office open. Judge Johnson did not keep the Clerk's office open, nor did she contact Mr. Richard's lawyers to inform them that she was available to receive a filing.

On September 25, 2007, at 5:57 p.m., Richard's lawyers filed a 2-page motion to stay with the Harris County District Clerk's office, along with a motion for stay of execution in the United States Supreme Court, both based on the grant of certiorari in *Baze*. Later that evening, the United States Supreme Court denied Richard's motion to stay and he was thereafter executed.

The CCA did not have formal execution-day procedures on September 25, 2007. Rather, the CCA followed a set of common practices. Mr. Marty (who was present at the court) knew of the practices but thought keeping the Clerk's office open was an administrative matter and under the jurisdiction of the Presiding Judge. Mr. Marty testified that he did tell Judge Johnson about

the call from TDS. Regardless, it is clear that Judge Keller did not have a duty to do anything other than what she did, which was to answer a question about when the Clerk's office closes.

C. EVENTS WHICH DID NOT OCCUR ON SEPTEMBER 25, 2007.

In light of the fact that Respondent is, in essence, accused of failing to prevent the premature execution of Mr. Richard, it is important to recognize the failures to act of other persons on September 25, 2007.

Although Judge Keller did not have a duty to do anything other than what she did on that day, Richard's lawyers had a duty to follow the law, timely file pleadings, and zealously represent their client. But on September 25, 2007: (i) no lawyer for Richard ever once contacted any CCA judge, its General Counsel, or staff member; (ii) no attempt was made to file an after-hour pleading in accordance with Texas Rule of Appellate Procedure 9.2(a); (iii) no motion to withdraw the execution date nor motion for writ of habeas corpus was filed with the trial court; and (iv) Richard in twenty years of litigation never once challenged the Texas protocol of administering a lethal injection until September 25, 2007.²

C. EVENTS WHICH OCCURRED AFTER SEPTEMBER 25, 2007.

In the days immediately following Mr. Richard's execution, there were many reports in the media about the *Baze* decision and the coincidence that Mr. Richard was executed just hours after *Baze* was announced. In the first couple of days after the execution, Mr. Richard's lawyers, including Prof. Dow, did not mention any computer problems as having played a role in their failure to file anything on behalf of Mr. Richard.³ Indeed, in a *Houston Chronicle* article on September 27, 2007, Prof. Dow did not mention computer problems or Judge Keller; in another

² Richard acknowledged this in the motion for stay that he filed in the United States Supreme Court when he wrote: "although he himself did not previously present the issue, the issue, as presented in *Baze*, is identical to the issue he seeks to present."

³ Computer crashes have, as this case has progressed, evolved into e-mail problems, but TDS did not mention e-mail problems, either, in the early press reports.

Houston Chronicle article on September 28, “defense lawyers” said “they had too little time to prepare their appeals.” It was not until it became clear that *Baze* had caused a de facto moratorium on executions nationwide that the TDS lawyers began blaming Judge Keller for their failure to obtain a stay of execution for Mr. Richard.

Mr. Richard’s widow and his daughter sued Judge Keller for violation of his civil rights under 42 U.S.C. § 1983 for allegedly violating Mr. Richard’s rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and asserted state-law claims for intentional infliction of emotional distress and assault and battery. The United States District Court for the Western District of Texas, Lee Yeakel presiding, found that Judge Keller was entitled to full judicial immunity for all of her acts on September 25, 2007, and dismissed all of the plaintiffs’ claims.

III. ARGUMENT AND AUTHORITIES

A. RESPONDENT DID NOT VIOLATE CANON 2A.

Respondent has been charged with willful and persistent violation of Canon 2A of the Texas Code of Judicial Conduct. The facts demonstrate beyond peradventure, however, that Respondent did not violate this Canon.

Canon 2A provides that “[a] judge *shall* comply with the *law* and *should* act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Tex. Code. Jud. Conduct, Canon 2A (emphasis added).

Judge Keller simply cannot be disciplined for any alleged failure to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” because the Canons expressly provide that any canon which prescribes or proscribes conduct by

using the terms “should” or “should not” is merely an aspirational goal which is “not . . . a binding rule under which a judge may be disciplined.” Tex. Code. Jud. Conduct, Canon 8B(2).

In any event, Judge Keller at all relevant times acted with complete integrity and impartiality. “Integrity” means “soundness or moral principle and character,” and is “synonymous with ‘probity,’ ‘honesty,’ and ‘uprightness.’” BLACK’S LAW DICTIONARY 727 (1979). “Impartiality” means “[f]avoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just.” *Id.* at 677.⁴ There simply is no evidence – indeed, there is no allegation – that Judge Keller’s conduct on September 25, 2007, was in any way dishonest, nor that she would have responded to Mr. Marty’s question differently under any other circumstance. Indeed, Prof. Dow testified that Judge Keller is a good judge, competent and not corrupt.

Although Respondent could not be disciplined had she violated the second clause of Canon 2A (which she did not), there is no doubt that the first part of Canon 2A – which requires judges to comply with the law – is a “binding obligation[] the violation of which can result in disciplinary action.” *Id.*, Canon 8B(1). The question then arises: what law did Respondent violate? The answer is: None.

Pursuant to the Judicial Code, the term “law” denotes court rules as well as statutes, constitutional provisions and decisional law. *Id.*, Canon 8B(8). In this regard, it is important to note that the CCA does not have authority to make rules beyond procedural rules for reviewing

⁴ See also American Bar Assoc., Model Code of Judicial Conduct, Terminology (“‘Impartiality’ or ‘impartial’ denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.”); *id.*, Canon 1, Commentary (“‘integrity’ means ‘probity, fairness, honesty, uprightness, and soundness of character’”).

cases,⁵ so its execution-day policies therefore are not, and cannot be, “court rules” within the meaning of the Judicial Code.

In addition, Texas case law instructs that “‘comply with the law’ . . . mean[s] both that the judge should *apply* the law from the bench and *abide* by the law in all of his or her other activities.” Robert Schuwerk & Lillian Hardwick, 48A HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 26:4, at 94 (West 2009). Here, of course, Judge Keller was not *applying* any sort of law on September 25, 2007 – that is, she was not rendering any sort of legal decision when she stated that the Clerk’s office would close at 5:00 p.m. Rather, Respondent was merely reciting a fact and acknowledging a procedure that is codified in law: the CCA’s Clerk’s office closes at 5:00 p.m. every day. *See* Tex. Gov’t Code § 658.005(a). This is not an “application of the law” under Canon 2A.

The Examiner’s charge of a violation of Canon 2A fails for several additional reasons. First, the Examiner has not, and cannot, identify a single statute, regulation, or rule with which Judge Keller failed to comply. In her Responses to a simple interrogatory propounded by Respondent (“Describe any law(s) Respondent allegedly violated on September 25, 2007 [and] . . . provide the citation to that law”), the Examiner simply cited the laws under which this proceeding is being prosecuted⁶ – which completely begs the question, as Canon 2A requires the violation of some *independent, underlying* law or rule. The Examiner’s evasive – and circular – response to a simple question (“Respondent should be disciplined for violating Canon 2A

⁵ *See* Tex. Gov’t Code § 22.108(a) (“The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.”). Under the broadest reading of this provision, an unwritten policy cannot be considered a “promulgated rule.”

⁶ A copy of the Examiner’s Interrogatory Responses is attached at tab A. In response to Interrogatory No. 2, the Examiner cites Tex. Const. art. 5, §1-a(6)A and art. 1, § 13; Tex. Gov’t Code § 33.001(b); and Tex. Code. Jud. Cond. Canons 2A, 3B(8), 3C(1), and 3C(2). Even if one accepts the Examiner’s argument that violation of any of these laws comprises a violation of Canon 2A, Respondent will show below that she did not violate these provisions.

because she violated Canon 2A”) reveals the lacuna that lies at the core of her charges under Canon 2A: Judge Keller never failed to comply with a law.

The Examiner may argue that by failing to contact Judge Johnson about Mr. Marty’s call, Respondent violated the CCA’s unwritten tradition of referring communications about executions to the judge assigned to handle such matters. Simply to state the Examiner’s position reveals its absurdity. Laws and rules are, by their very nature, written; in particular, the rules governing the CCA are codified in article 5 of the Texas Constitution, chapter 22 of the Texas Government Code, the Texas Rules of Appellate Procedure, and the rules and internal operating procedures published by the CCA. Respondent did not violate any of those statutes or rules. *Cf. Haney v. State*, 544 S.W.2d 384, 387-88 (Tex. Cr. App. 1976) (person cannot be prosecuted based on a violation of an unwritten law). The worst that can be said of Respondent’s conduct is that she declined to exercise her authority to order the Clerk’s office to remain open as long as Mr. Richard’s attorneys wanted – but that is not a failure to comply with a law.

In this regard, the case of *Ford v. State* is instructive. *Ford* was an appeal of a murder conviction in which the defense argued that the trial judge committed reversible error by refusing to perform a jury shuffle, which is a statutory right. *See* Tex. Code Crim. P. art. 35.11. The State conceded that the judge erred, but argued that the error would better be addressed through a disciplinary proceeding. The Court of Appeals rejected that argument:

In those instances where the conduct of a judge in failing to follow a mandatory procedure is either “willful or persistent,” the State suggests the matter could be dealt with through disciplinary sanctions by the State Commission on Judicial Conduct. *We do not believe disciplinary sanctions in situations such as this would be either warranted or effective.*

Ford v. State, 977 S.W.2d 824, 828 (Tex. App. – Fort Worth 1998) (emphasis added; citation omitted), *rev’d on other grounds*, 73 S.W.3d 923 (2002). If disciplinary sanctions are not warranted in a situation where a judge willfully and persistently violates a mandatory procedure,

such sanctions plainly are not warranted where the “law” in question is merely an unwritten tradition of court practice.

B. CANON 2A IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS.

Canon 2A is unconstitutional under the facts of this case, because it does not give any notice that answering a question about the closing time of the Clerk’s office, or not keeping the Clerk’s office open past 5:00 p.m., could possibly subject a judge to discipline. Accordingly, the Canon is unconstitutionally vague.

“[A]n enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). First, a rule must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.” *Id.* Additionally, “laws must provide explicit standards for those who apply them.” *Id.* “A vagueness challenge to a statute that does not involve first amendment freedoms must be examined in light of the facts of the case at hand.” *United States v. Powell*, 423 U.S. 87, 92. 96 S.Ct. 316, 319 (1975).

Canon 2A fails both prongs of the *Grayned* test. Canon 2A lacks the specificity which would provide a person of ordinary intelligence with a reasonable opportunity to know precisely what conduct is being prohibited. While the Code of Judicial Conduct includes definitions for selected words and phrases, specific meanings for “integrity” and “impartiality” have been omitted. *See* Tex. Code of Jud. Conduct, Canon 8B. In comparison, the ABA Code of Judicial Conduct not only contains definitions for “integrity” and “impartiality,” but also provides commentary for purposes of clarifying the nature of conduct that could render a judge subject to censure. *See* ABA Code of Judicial Conduct, Terminology and Canon 1.1. While the ABA

Code may also be insufficiently specific, at least it provides *some* guidance in interpreting what constitutes prohibited conduct.

In addition, Canon 2A requires “viewing the judge’s obligations from the public perception.” See Texas Supreme Court Advisory Committee on the Texas Code of Judicial Conduct Transcript, at 12 (September 10, 2004). If a public perspective is to be applied when analyzing the propriety of a judge’s conduct, the vagueness of Canon 2A becomes maddening. Examining the conduct of a judge through a public perspective is a completely arbitrary and subjective enterprise, as demonstrated by the numerous newspaper articles the Examiner has listed as “evidence.” Those articles express outrage over Respondent’s alleged conduct – but they are all based on an inaccurate and incomplete factual predicate (as is the Amended Notice).

Where facts are distorted, even unwittingly, conclusions are based on imagination rather than reality. Thus, for example, a group of attorneys, including Mr. McKetta, who is donating his services as Special Counsel to the Commission, filed a complaint against Judge Keller with the Commission on October 15, 2007. See Amended Complaint attached hereto at tab B. That Complaint’s “facts” are drawn entirely from media reports of the events of September 25, 2007. See *id.* at 1-3. Based on those “facts,” the signatories state that “Judge Keller refused to allow the attorneys for Michael Richard . . . to file pleadings on his behalf[.]” *Id.* at 1. As shown above, this statement is utterly false: Judge Keller did not refuse to allow Mr. Richard’s attorneys to file anything, and under Texas Rule of Appellate Procedure 9.2, she could not have stopped them from filing anything.

The Commission has acknowledged that although “[i]t appears from the cases which have addressed the question of unconstitutional vagueness in this context that a greater degree of flexibility is permitted with respect to judicial discipline,” a “statute may be successfully

challenged as vague if it does not clearly define the conduct regulated, and thus does not afford an individual fair warning of what conduct is prohibited.” *In re Lowery*, 999 S.W.2d 639, 654 (Tex. Rev. Trib. 1998) (citing *In the Matter of Seraphim*, 294 N.W.2d 485, 492 (Wis. 1980) and *Halleck v. Berliner*, 427 F.Supp 1225, 1240 (D.D.C. 1977)). While there may be some instances where a judge’s conduct may be so clearly violative of Canon 2A that a vagueness argument would not stand, *see, e.g. In re Thoma*, 873 S.W.2d 477, 489 (Tex. Rev. Trib. 1994) (outright corruption), Respondent’s conduct is of an entirely different character. Canon 2A is unconstitutionally vague as applied to the facts of this case.

C. RESPONDENT DID NOT VIOLATE CANON 3B(8).

In Charges I through IV of the Amended Notice, the Examiner alleges that Respondent violated Canon 3B(8) of the Texas Code of Judicial Conduct. The relevant parts of that Canon read as follows:

A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law. . . . A judge shall require compliance with this subsection by court personnel subject to the judge’s direction and control.

Tex. Code. Jud. Conduct, Canon 3B(8).

There simply is no basis in fact, nor has there ever been, for Respondent to be charged with violating this Canon. At no time did Respondent deny or impair Mr. Richard’s “right to be heard according to law.” There is absolutely no question that, notwithstanding the fact that the clerk’s office closed, per statute, at 5:00 p.m. on September 25, 2007, Mr. Richard’s lawyers could have filed any documents they wished simply by “delivering it to . . . a justice or judge of that court who is willing to accept delivery.” Tex. R. App. P. 9.2(a). It is also undisputed that lawyers at TDS knew of that procedure, because they had used it in a different case. It is also undisputed that at least three CCA judges, as well as the CCA General Counsel, were at the CCA

courthouse well after 5:00 p.m. on September 25, 2007, and that they were willing to accept any document Mr. Richard's lawyers delivered. Furthermore, Judge Johnson, one of the judges who remained at the courthouse, was informed of the request to keep the Clerk's office open.

The fact of the matter is that Mr. Richard's lawyers chose not to file anything with the CCA; they elected instead to file a motion for stay and a petition for writ of prohibition with the trial court. The fact that they apparently regret their decision does not change the fact that it was their decision, and Respondent did not lock them out of the CCA courthouse, as they and the Examiner pretend.

Inasmuch as Mr. Richard was not denied access to any court on September 25, 2007, Judge Keller cannot be disciplined for any failure to "require compliance with this subsection by court personnel subject to the judge's direction and control." The Examiner may argue that by not informing Judge Johnson of Mr. Marty's call – or by not telling Mr. Marty to contact Judge Johnson – Respondent somehow interfered with Mr. Richard's "right to be heard according to law." That is nonsense. Respondent had no duty to inform Judge Johnson or Mr. Marty of anything; Mr. Richard's attorneys had an obligation to competently and zealously represent their client. That Mr. Richard's attorneys failed in their duties does not create, after the fact, some duty for Judge Keller. If anyone at the Court had a duty to reach out and help Mr. Richard's lawyers do their jobs, it was Judge Johnson, who was informed of their request to keep the Clerk's office late by Mr. Marty. But Judge Johnson did nothing.

In this regard, it is important to note that the Examiner's charges misrepresent the standard of conduct required by Canon 3B(8). As already noted, that Canon states that a "judge shall require compliance with this subsection by court personnel subject to the judge's direction and control." In contrast, Charges I, II, and V state that "Judge Keller's . . . failure to require *or*

assure compliance by the CCA General Counsel and clerk staff with respect to Mr. Richard's right to be heard" constitutes a violation of Canon 3B(8). Amended Notice, at 8. 9 (emphasis added). The Examiner distorts and misuses the Canon in several ways.

First, the Canon simply does not require Respondent to "assure compliance" by Ed Marty or Abel Acosta with any rule, and the Examiner's suggestion that it might is objectionable. It is one thing to order an employee to follow certain standards of conduct and performance, and to discipline the employee if she violates those standards. It is entirely different to assume the duty of assuring that the employee complies with those standards in everything she does. That would require the employer to constantly surveil the employee and to prevent or correct each infraction. The Canons do not require judges to turn their courts into little police states.

Second, neither Mr. Marty nor Mr. Acosta were "subject to the judge's direction and control," as required by Canon 3B(8). Contrary to the Examiner's belief, the undisputed facts, fully known to the Examiner and her Special Counsel before making this charge, are otherwise. Mr. Marty and Mr. Acosta were employees of the Court of Criminal Appeals, and the *entire Court* was responsible for their performance. Thus, Judge Johnson – the assigned Judge on September 25, 2007 – testified as follows:

Q. All right. And as I understand it – but tell me if I'm wrong -- the Personnel Committee which Judge Price heads is responsible for the employees of the court, which include the General Counsel and then everybody else. Correct?

A. That's correct.

June 26, 2009, Deposition of Judge Cheryl Johnson, at 58:22-59:2. And in her statement to the Commission, Judge Johnson stated as follows:

MS. WILLING: And how -- what is the relationship between Edward Marty and Judge Keller? How would you describe that relationship?

JUDGE JOHNSON: . . . We have had some difficulties with general counsel both Mr. Marty and his predecessor, Mr. [Wetzel], behaving as if they believe that

they work for the presiding judge. . . . And I have been told that he's been repeatedly counseled that he does not work for the presiding judge. *He works for the court and he must behave in that manner. . . . We are independently elected. We are responsible ourselves. We are nine of us the court. And we all have a hand in running the clerk's office.*

July 17, 2008, Statement of Judge Cheryl Johnson, at 28:21-29:21 (emphasis added). So, it is it is clear beyond peradventure that neither Mr. Marty nor Mr. Acosta was subject to the "direction and control" of Respondent.

In addition, the cases under this Canon demonstrate that the conduct alleged by the Examiner simply does not fall within the purview of Canon 3B(8). For example, District Judge Annette Galik was subject to a public admonition for "conducting hearings and entering orders without according interested parties and their attorneys the right to be heard." *See* CJC No.00-0359-DI, Public Reprimand of Annette Galik (9/19/00). Similarly, Justice of the Peace Bob Wall proceeded with a criminal trial and found the defendant guilty in absentia, even though Judge Wall knew that the defendant's attorney and the prosecutor were in trial in a courtroom across the hall. *See* CJC No. 06-045-JP, Public Admonition of Bob Wall (7/13/07). In another case, a plaintiff in small claims court allegedly was informed by court staff that her case would be heard an hour later than scheduled. When she arrived, she learned that the judge had dismissed her case for want of prosecution. The judge told her she could refile, which she did. Before the refilled case was heard, however, the judge entered an order dismissing her first case with prejudice, which the judge honored in granting a motion to dismiss the second case. *See* CJC No. 8330, Public Admonition of Tony Torres (07/26/96).

By contrast with these cases, all Judge Keller did was accept a call to her at home and confirm that the Clerk's office closes at 5:00 p.m. Acknowledging a simple fact is not cause for judicial censure. The Examiner seeks to discipline Respondent not for any conduct prohibited by the Canons of Judicial Ethics, but for not offering Richard's lawyers special treatment and

ordering that the Clerk's office remain open as late as they wished – special treatment that has never been accorded to any other party, and which was utterly unnecessary, given Texas Rule of Appellate Procedure 9.2 and the undisputed fact that CCA judges were available and willing to accept Richard's documents.

Judge Keller did not deny Mr. Richard any right. Canon 3B(8) simply does not apply to the facts of this case.

D. CANON 3B(8) IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS.

As with Canon 2A, Canon 3B(8) is unconstitutional under the facts of this case. Respondent will not repeat the legal standards for unconstitutional vagueness set forth in Section 3.B., above, but simply observe that, under those standards, Canon 3B(8) would be unconstitutionally vague if it permitted a judge to be disciplined for allowing the Clerk's office to close as scheduled and as directed by statute.

E. RESPONDENT DID NOT VIOLATE CANONS 3C(1) OR 3C(2).

Canons 3C(1) and 3C(2) provide, in their entirety, as follows:

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

Tex. Code. Jud. Conduct, Canon 3C(1), 3C(2).

For reasons already explained, Judge Keller cannot be disciplined for any alleged failure to "promptly discharge [her] administrative responsibilities" or to "require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and

diligence that apply to the judge” because these Canons prescribe and proscribe conduct by using the terms “should” (not “shall”) and therefore are merely an aspirational goal which are “not . . . binding rule[s] under which a judge may be disciplined.” Tex. Code. Jud. Conduct, Canon 8B(2).

In addition, these Canons do not apply to Judge Keller’s conduct on September 25, 2007, because the Canons expressly apply only to “administrative responsibilities.” Simply confirming that the Clerk’s office closes at 5:00 p.m. is not an administrative responsibility that a judge discharges. diligently and promptly, or otherwise. Likewise, Judge Keller had no responsibility to keep the Clerk’s office open past 5:00 p.m., because Mr. Richard’s lawyers were free to file their papers with the CCA pursuant to the provisions of Texas Rule of Appellate Procedure 9.2.⁷

Canons 3C(1) and 3C(2) do not apply to this proceeding, and disciplinary action cannot be predicated upon either Canon.

F. RESPONDENT DID NOT VIOLATE ARTICLE 5, §1-A(6) OF THE TEXAS CONSTITUTION.

The Texas Constitution provides as follows:

Any Justice or Judge of the courts ... may, subject to the other provisions hereof, be removed from office for [1] willful or persistent violation of rules promulgated by the Supreme Court of Texas, [2] incompetence in performing the duties of the office, [3] willful violation of the Code of Judicial Conduct, or [4] willful and persistent conduct that is clearly inconsistent with the proper performance of [her] duties or [5] casts public discredit upon the judiciary or the administration of justice.

Tex. Const. Article 5, §1-a(6) (material in brackets added). Respondent will address each of the five predicates for removal from office in turn.

⁷ As United States District Judge Lee Yeakel observed in his September 29, 2008, Memorandum Opinion and Order Granting Motion to Dismiss (at pp. 11-12) in *Richard v. Keller*, No. A-07-CA-946-LY, under Texas Rule of Appellate Procedure 9.2, accepting a tendered document is a judicial function. Logically then, what Judge Keller is accused of doing – directly or indirectly preventing a document from being filed – was also a judicial function. A copy of Judge Yeakel’s order is attached at tab C.

1. **Respondent Did Not Violate a Supreme Court Rule.**

A judge may be removed from office for “willful or persistent violation of the rules promulgated by the Supreme Court of Texas.” The only rule established by the Supreme Court that has any relevance to this proceeding is Texas Rule of Appellate Procedure § 9.2(a). As stated above, this section provides:

A document is filed in an appellate court by delivering it to: (1) the clerk of the court in which the document is to be filed; or (2) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk.

As already explained, Respondent’s conduct in no way constitutes a violation of this rule. Richard’s counsel was aware that the filing of a motion is not required to be made with the Clerk of the Court. The rule specifically provides that a filing may be made with a justice or a judge of the court who is willing to accept delivery, and it is undisputed that three CCA judges and the CCA General Counsel were available and willing to accept Richard’s papers. As such, Respondent’s statement that the Clerk’s office closed at 5:00 p.m. did not constitute willful or persistent violation of any Supreme Court rule.

In addition, the Examiner has not identified any Supreme Court rule she believes was violated by Judge Keller. See Interrogatory Responses attached at tab A.

2. **Respondent is Not Incompetent.**

In Charge V, the Examiner alleges that “Judge Keller’s failure to follow CCA’s Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the CCA General Counsel and clerk staff with respect to Mr. Richard’s right to be heard, constitutes incompetence in the performance of duties of office[.]”

“Generally, ‘incompetence’ means ‘the state or fact of being unable or unqualified to do something.’” *In re Rose*, 144 S.W.3d 661, 735 (Tex. Rev. Trib. 2004) (citing BLACK’S LAW

DICTIONARY 768 (7th ed. 1999)). In addition, the Commission has employed the Supreme Court of Louisiana's definition of incompetence for purposes of removal of a judge: "whether the conduct at issue establishes that the respondent lacks the requisite ability, knowledge, judgment or diligence to consistently and capably discharge the duties of the office he or she holds." *Id.* (citing *In re Hunter*, 823 So.2d 325, 336 (La. 2002)).

The meaning of judicial "incompetence" is demonstrated by the *Rose* case. In *Rose*, a justice of the peace was found to be incompetent for failing process approximately 22,000 citations, failing to deposit funds amounting to more than \$300,000, failing to process 7,400 cases, and additional instances when litigants desiring adjudication were unable to promptly dispose of criminal matters pending against them. *See id.* at 689, 694. Similarly, in *In re Chacon*, 138 S.W.3d 86, 96 (Tex. Rev. Trib. 2004), a justice of the peace was found to be incompetent based on evidence of "not just a single incident, but with many instances of judicial misconduct" comprising "willful and persistent violations of the law" which resulted in "wrongful arrest and incarceration, denial of the right to trial by jury, and deprivation of a family's own home."

Here, in stark contrast, Respondent has not taken any action that indicates in any way that she lacks the requisite ability, knowledge, judgment, diligence, or integrity to consistently and capably discharge the duties of the office she holds. More importantly, as the definition of "incompetence" cited by the *Rose* tribunal states, incompetence is not an event, as charged by the Examiner, but a *state*: an *ongoing condition* of being incapable of performing some duty or responsibility. One does not snap in and out of judicial competence depending on whether the Examiner agrees with one's conduct on a given day; one either is competent to perform the job of Presiding Judge of the Court or Criminal Appeals, or one is not.

Judge Keller is competent to serve as Presiding Judge of the Court of Criminal Appeals.

3. Respondent Did Not Violate the Code of Judicial Conduct.

As demonstrated above, Judge Keller did not violate Canons 2A, 3B(8), 3C(1), or 3C(2) of the Code of Judicial Conduct. Accordingly, Judge Keller cannot have violated Article 5, §1-a(6) of the Texas Constitution premised on a violation of the Code of Judicial Conduct.

4. Respondent's Conduct Was Neither Willful Nor Persistent Conduct That Is Clearly Inconsistent With Proper Performance Of Her Duties.

- a. *Respondent did not violate § 1-a(6)'s standards as defined by § 33.001(b) of the Government Code.*

In the Amended Notice (at p. 7), the Examiner cites Section 33.001(b) of the Texas Government Code as setting forth standards of conduct allegedly violated by Respondent. The provisions cited by the Examiner are as follows:

For purposes of Section 1-a, Article V, Texas Constitution, "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" includes:

- (1) wilful, persistent, and unjustifiable failure to timely execute the business of the court, considering the quantity and complexity of the business;
- (2) wilful violation of a provision of the Texas penal statutes or the Code of Judicial Conduct;
- (3) persistent or wilful violation of the rules promulgated by the supreme court; [and]
- (4) incompetence in the performance of the duties of the office.

The Examiner alleges "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" in Charge I and Charge III of her Amended Notice. See Amended Notice at 8. The factual predicates of those charges are: (1) Judge Keller's failure to follow CCA's Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the CCA General Counsel and clerk staff with respect to Mr. Richard's right to be

heard” (Charge I), and (2) “Judge Keller’s conduct on September 25, 2007, did not accord Mr. Richard access to open courts of the right to be heard according to law.” (Charge III)

None of these allegations constitutes a “wilful, persistent, and unjustifiable failure to timely execute the business of the court,” for the simple reason, explained more fully below, that a single conversation on one day cannot be “persistent” conduct. In addition, Judge Keller’s conduct did not comprise “failure to timely execute the business of the court.” Nor do the Examiner’s allegations constitute a violation of the penal statutes. Finally, Respondent has already demonstrated that she did not violate any Canon of the Code of Judicial Conduct nor any Supreme Court rule. Likewise, Judge Keller has disproved the allegation that she is incompetent to be Presiding Judge of the CCA.

Accordingly, Judge Keller did not violate any cited provision of Section 33.001(b) of the Texas Government Code.

b. *Respondent’s Conduct Was Not Willful or Persistent.*

Respondent had a telephone conversation with Mr. Marty which lasted between one and two minutes. During the course of that brief conversation, she stated that the Clerk’s office closes at 5:00. Respondent’s conduct was neither willful nor persistent.

“Willful conduct is the intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment or lack of diligence.” *In re Bell*, 894 S.W.2d 119, 126 (Tex. Spec. Ct. Rev. 1995) (citing *In re Thoma*, 873 S.W.2d 477, 489 (Tex. Rev. Trib. 1994)). “Willful conduct requires a showing of bad faith, including a specific intent to use the powers of office to accomplish an end which the judge knew or should have known was beyond the legitimate exercise of authority.” *Id.* Moreover, “willfulness necessarily encompasses conduct

involving moral turpitude, dishonesty, corruption, misuse of office, or bad faith generally, whatever the motive.” *In re Barr*, 13 S.W.3d 525, 534 (Tex.Rev.Trib. 1998).

A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority may in and of itself constitute bad faith. A judge acts intentionally, or with intent, when the act is done with the conscious objective of causing the result or of acting in the manner defined in the pertinent rule of conduct. Gross indifference is indifference that is flagrant, shameful and beyond all measure and allowance. It is such conduct, particularly by members of the judiciary, that is not to be excused. A judge is subject to discipline for “willful” violation of any canon of judicial conduct as long as she or he intends to engage in conduct for which she or he is disciplined, whether or not she or he has specific intent to violate the canon.

Id. at 534-35 (Tex. Rev. Trib. 1998) (citations to *In re Thoma*, 873 S.W.2d 477, 489-90 (Tex. Rev. Trib. 1994), *In re Conduct of Schenck*, 318 Or. 402, 870 P.2d 185, 189 (1994), and *In re Flanagan*, 240 Conn. 157, 690 A.2d 865 (1997), omitted)).

There simply can be no rational argument that Judge Keller acted “willfully” as defined by the governing case law. She did not misuse her office. She did not act beyond the legitimate exercise of her authority. She did not intend to cause Mr. Richard’s lawyers to fail to file anything with the CCA. Her conduct was not dishonest or corrupt in any way. Her conduct did not involve even an error of judgment or a lack of diligence.

In addition, Judge Keller’s conduct was not persistent. Courts have defined “persistent” conduct with respect to judicial disciplinary proceedings as “constant conduct which demonstrates a series of associated efforts and determination and which is insistently repetitive or continuous.” *Id.* at 558-59. Judge Keller’s conduct comprised one fleeting episode; it was not constant, repetitive, or continuous.

b. *Respondent's Conduct Was Not Clearly Inconsistent With the Proper Performance Of Her Duties.*

Most importantly, it is clear beyond peradventure that Respondent's actions were not in any way inconsistent with the proper performance of her duties. On September 25, 2007, Respondent told Mr. Marty that the Clerk's office closed at 5:00 p.m. Respondent's statement was true, and consistent with years of CCA practice. The CCA had, to Respondent's knowledge, never kept the Clerk's office open past 5:00 p.m., and it didn't need to, in light of Texas Rule of Appellate Procedure 9.2. It is absurd to suggest that Respondent's actions on September 25, 2007 were "clearly inconsistent" with the proper performance of her duties.

5. **Respondent's Conduct Was Not Willful or Persistent Conduct Which Cast Public Discredit on the Judiciary or Administration of Justice.**

As already explained, Respondent's conduct cannot be considered either "willful" or "persistent," as those terms are defined by the Texas cases, so her conduct cannot subject her to discipline under Article 5, § 1-a(6) of the Texas Constitution.

In addition, there is no evidence that Judge Keller's conduct cast public discredit on the judiciary or the administration of justice. To the extent, if any, that any discredit has been cast upon the judiciary or the administration of justice, it has been cast, not by Judge Keller's conduct, but by the conduct of Mr. Richard's lawyers, who not only failed their client but published inaccurate, misleading, and blatantly false statements about the events of September 25, 2007 – statements which falsely imputed responsibility for their failure to file a motion for stay of execution with the CCA to Judge Keller. Any discredit cast upon the judiciary also is the responsibility of those who unquestioningly published negative opinions – it would be disingenuous to refer to the publications as "statements," as that would falsely suggest that they were grounded in fact – without attempting to verify the "facts" upon which they were based.

G. ARTICLE 5, §1-A(6) OF THE TEXAS CONSTITUTION IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS.

As with Canon 2A and Canon 3B(8), Article 5, Section 1-a(6) is unconstitutional under the facts of this case. Respondent will not repeat the legal standards for unconstitutional vagueness set forth in Section 3.B., above, but simply observe that, under those standards, Article 5, Section 1-a(6) would be unconstitutionally vague if it permitted a judge to be disciplined for allowing the Clerk's office to close as scheduled and as directed by statute.

In addition, predicating discipline on whether a judge "casts public discredit upon the judiciary" would not only be unconstitutional on grounds of vagueness under *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), but it also would threaten the independency of the judiciary and therefore the separation of powers that is explicit, and mandatory, in the Texas constitution. *See* Tex. Const. Art.2, § 1. Give the vagueness of the "public discredit" standard of Article 5, Section 1-a(6), imposing discipline premised just upon that provision would impair judges' ability to follow the law, and encourage them to do merely what is popular, not what is right.

H. THE CHARGES ARE UNCONSTITUTIONAL BECAUSE RESPONDENT'S RIGHTS TO DUE PROCESS HAVE BEEN VIOLATED.

Pursuant to Article 5, § 1-a(11) of the Texas Constitution, the Supreme Court shall provide by rule for the procedures for disciplining Texas judges. "Such rule shall ... afford ... due process of law for the procedure before the Commission, Masters, review tribunal and Supreme Court in the same manner that any person whose property rights are in jeopardy in an adjudicatory proceeding is entitled to due process of law ..." *Id.* "Due process shall include the right to notice, counsel, hearing, confrontation of his accusers, and all such other incidents of due process as are ordinarily available in proceedings whether or not misfeasance is charged, upon proof of which a penalty may be imposed." *Id.*

The requirement of procedural due process “involves the preservation of both the appearance and reality of fairness so that ‘no person will be deprived of his interests in the absence of a proceeding in which he may present his case with *assurance that the arbiter is not predisposed against him.*’” *Pickell v. Brooks*, 846 S.W.2d 421, 427 (Tex. App. – Austin 1992, writ denied) (emphasis added; quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)). The problem presented by this case is that the Commission’s Special Counsel, Mr. McKetta, was one of a number of prominent attorneys who filed a complaint against Judge Keller with the Commission on October 15, 2007. *See* Amended Complaint (tab B). The Commission did not select an impartial outsider to evaluate and bring charges against Respondent; it chose, wittingly or not, a partisan, an advocate against Respondent.

Respondent deserves to be judged by an objective and disinterested tribunal. Although she is confident of the Special Master’s fairness and objectivity, it is manifestly unfair for her to be prosecuted before the Special Master by the Commission’s own counsel – that is, by the attorney to the body which will review the Special Master’s findings. Certainly, the Examiner would object if the panel reviewing the Special Master’s findings of fact were the Management Committee of Jackson Walker.

Unfortunately, the unfairness to Respondent only increases when this proceeding moves to the Commission, for there, the Commission will have to decide whose version of the facts it believes more: Respondent’s, or those endorsed by the Commission’s own Executive Director and Special Counsel – a Special Counsel whose animosity to Respondent is a matter of record.

Respondent is entitled due process. This proceeding is not providing it. Accordingly, all charges against Respondent should be dismissed.

IV. **CONCLUSION**

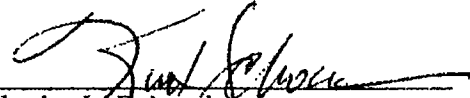
Respondent Sharon Keller did nothing wrong on September 25, 2007. The fact that Mr. Richard's attorneys did not file any request for relief with the Texas Court of Criminal Appeals on that date was not Judge Keller's fault. The fact that not one of Mr. Richard's lawyers saw fit to contact the CCA – or the trial court, or Governor Perry – is not her fault, either. That political and ideological opponents have made shrill and unfounded allegations against her is a matter over which she has no control.

All Judge Keller did on September 25, 2007, was answer a question about the Clerk's office, and she did so truthfully and in accordance with the statute which prescribes the hours that office is to be open. She did not violate any of the Judicial Canons or other standards of conduct on which the Examiner's charges are based.

There simply is no evidence supporting any sort of sanction against Judge Keller. Respondent respectfully requests that the Special Master find that there are no facts supporting any of the charges against her and that the charges be dismissed as a matter of law.

Respectfully submitted,

JACKSON WALKER L.L.P.

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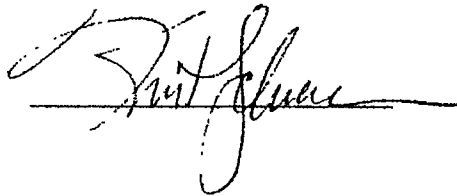
**ATTORNEYS FOR RESPONDENT
THE HONORABLE SHARON
KELLER**

CERTIFICATE OF SERVICE

This is to certify that on this 14th day of August, 2009, a true and correct copy of the foregoing document was served via electronic transmission:

Ms. Seana Willing
State Commission on Judicial Conduct
P.O. Box 12265
Austin, Texas 78711
Facsimile #512-463-0511

Mr. John J. McKetta, III
Graves Dougherty Hearon & Moody
401 Congress Ave., Suite 2200
Austin, Texas 78701

A handwritten signature in black ink, appearing to read "John J. McKetta, III", written over a horizontal line.

“A”

**BEFORE THE
STATE COMMISSION ON JUDICIAL CONDUCT**

INQUIRY CONCERNING A JUDGE,

No. 96

FIRST AMENDED ANSWERS TO RESPONDENT'S FIRST SET OF INTERROGATORIES

TO: The Honorable Judge Sharon Keller, by and through her counsel of record Charles ("Chip") L. Babcock, JACKSON WALKER, LLP, 1401 McKinney Street, Suite 1900, Houston, Texas 77010.

COMES NOW, the State Commission on Judicial Conduct ("State Commission") and submits these its First Amended Answers to Respondent's First Set of Interrogatories.

Respectfully submitted,

EXAMINERS:

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Executive Director
Texas Bar No. 00787056

SPECIAL COUNSEL

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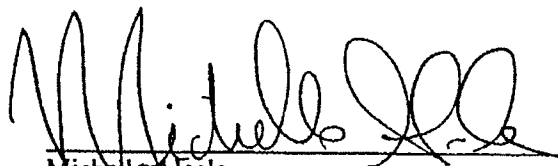
By: 

Michelle Alcala

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following counsel via U.S. Certified Mail, Return Receipt Requested, on this 8th day of July, 2009:

Mr. Charles ("Chip") L. Babcock
JACKSON WALKER, LLP
1401 McKinney Street, Suite 1900
Houston, Texas 77010


Michelle Alcala

INTERROGATORY NO. 1:

Explain in detail the state interest in prohibiting a presiding judge from setting administrative hours of operation for the Clerk's Office of the Court.

ANSWER:

The State Commission objects to this request on the ground that there is no predicate for the interrogatory and it is overly broad, vague, and not limited in time or scope to the matters at issue in this lawsuit.

INTERROGATORY NO. 2:

Describe any law(s) Respondent allegedly violated on September 25, 2007. Please provide the citation to that law and describe how Respondent violated it.

ANSWER:

The State Commission incorporates the First Amended Notice of Formal Proceedings herein as if fully set forth at length. The First Amended Notice of Formal Proceedings specifically identifies the factual basis and the specific statutes and laws Respondent is alleged to have violated in this case. Notwithstanding this statement, on September 25, 2007, Judge Keller violated the CCA's Execution - Day Procedures when she spoke with Mr. Marty shortly before 5 p.m. and unilaterally made a decision to close the CCA's clerk's office or Court at 5 p.m. without directing Mr. Marty to relay the communication to the designated judge, or herself referring the matter to the designated judge assigned to the execution; she knew at the time that the inquiry related to the execution that was scheduled to occur at 6 p.m. that evening. Judge Keller was not the designated judge assigned to the Richard execution, and according to the CCA's Execution - Day Procedures, all communications about the Richard execution should have been first referred to the assigned judge.

The following laws are alleged to have been violated in the First Amended Notice of Formal Proceedings: Article 5, Section 1-a(6)A of the Texas Constitution, Section 33.001(b) of the Texas Government Code, Article 1, Section 13 of the Texas Constitution, and Cannons 2A, 3B(8), 3C(1), and 3C(2) of the Texas Code of Judicial Conduct. Judge Keller violated these laws on September 25, 2007 when after speaking with Mr. Marty shortly before 5 p.m. on September 25, 2007, she: (a) refused to keep the CCA's clerk's office or the Court open past 5 p.m.; (b) failed to clarify the reasons why Mr. Marty was asking her whether the CCA's clerk's office or the Court could stay open past 5 p.m.; (c) failed to raise any concern about Mr. Richard's lawyers ability to get their filing to the CCA judges prior to Mr. Richard's execution; (d) failed to accommodate Mr. Richard's legal team's situation, and (e) failed to take any steps to require Mr. Marty to comply with the Execution - Day Procedures or to herself relay the communications to the assigned judge despite knowing that: (i) Mr. Marty's call was about the execution that was scheduled that evening; (ii) the execution was scheduled to occur at 6 p.m.

that evening; (iii) certiorari had been granted in *Baze* that morning; (iv) a filing to prevent the execution based on the issue in *Baze* was likely to occur; (v) lawyers for the person scheduled to be executed wanted to file something with the CCA (vi) the lawyers were not ready to file with the CCA by 5 p.m., and that (vii) the lawyers had requested that they be permitted to file after 5 p.m. In addition, Judge Keller knew that it had been common in the past to receive late filings on execution days after the clerk's office closed, and she knew that the Execution – Day Procedures called for the designated judge to remain available after hours to receive last-minute communications regarding the scheduled execution.

INTERROGATORY NO. 3:

Explain in detail Respondent's alleged failure(s) to follow CCA's Execution-day Procedures on September 25, 2007.

ANSWER:

The State Commission objects to this interrogatory on the ground that it exceeds the scope of permissible discovery under Rule 197 of the Texas Rules of Civil Procedure to the extent it fails to seek a specific legal or factual basis, in general terms, of the State Commission's claims or defenses. An interrogatory may not be used to require the responding party to marshal all of its available proof it intends to use at trial.

Subject to and without waiving this objection, the State Commission's basic legal and factual contentions are that Judge Keller failed to follow the CCA's Execution – Day Procedures on September 25, 2007 when she spoke with Mr. Marty shortly before 5 p.m. and unilaterally made a decision to close the CCA's clerk's office or the Court at 5 p.m. without directing Mr. Marty to comply with the Execution-day procedures, or herself referring the matter to the designated judge assigned to the execution, despite knowing at the time that the inquiry related to the execution that was scheduled to occur at 6 p.m. that evening. Judge Keller was not the designated judge assigned to the Richard execution, and according to the CCA's Execution – Day Procedures, all communications about the Richard execution should have been first referred to the assigned judge.

INTERROGATORY NO. 4:

Explain every action(s) taken by Respondent that allegedly did not promote public confidence in the integrity and impartiality of the judiciary on September 25, 2007.

ANSWER:

The State Commission objects to this interrogatory on the ground that it exceeds the scope of permissible discovery under Rule 197 of the Texas Rules of Civil Procedure to the extent it fails to seek a specific legal or factual basis, in general terms, of the State Commission's claims or defenses. An interrogatory may not be used to require the responding party to marshal all of its

available proof it intends to use at trial.

Subject to and without waiving this objection, the State Commission's basic legal and factual contentions are that Judge Keller did not promote public confidence in the integrity and impartiality of the judiciary on September 25, 2007 by failing to follow the CCA's Execution - Day Procedures as described in response to Interrogatory No. 3.

In addition, Judge Keller did not promote public confidence in the integrity and impartiality of the judiciary on September 25, 2007 when after speaking with Mr. Marty shortly before 5 p.m. on September 25, 2007, she: (a) refused to keep the CCA's clerk's office or the Court open past 5 p.m.; (b) failed to clarify the reasons why Mr. Marty was asking her whether the CCA's clerk's office or the Court could stay open past 5 p.m.; (c) failed to raise any concern about Mr. Richard's lawyers' ability to get their filing to the CCA judges prior to Mr. Richard's execution; (d) failed to accommodate Mr. Richard's legal team's situation, and (e) failed to take any steps to require Mr. Marty to comply with the Execution - Day Procedures, or to herself relay the communications to the assigned judge despite knowing that: (i) Mr. Marty's call was about the execution that was scheduled that evening; (ii) the execution was scheduled to occur at 6 p.m. that evening; (iii) certiorari had been granted in *Baze* that morning; (iv) a filing to prevent the execution based on the issue in *Baze* was likely to occur; (v) lawyers for the person scheduled to be executed wanted to file something with the CCA; (vi) the lawyers were not ready to file with the CCA by 5 p.m.; and that (vii) the lawyers had requested that they be permitted to file after 5 p.m. In addition, Judge Keller knew that it had been common in the past to receive late filings on execution days after the clerk's office closed, and she knew that the Execution - Day Procedures called for the designated judge to remain available after hours to receive last-minute communications regarding the scheduled execution.

INTERROGATORY NO. 5:

Explain in detail how Respondent allegedly did not accord Mr. Richard access to open courts or the right to be heard according to law.

ANSWER:

The State Commission objects to this interrogatory on the ground that it exceeds the scope of permissible discovery under Rule 197 of the Texas Rules of Civil Procedure to the extent it fails to seek a specific legal or factual basis, in general terms, of the State Commission's claims or defenses. An interrogatory may not be used to require the responding party to marshal all of its available proof it intends to use at trial.

Subject to and without waiving this objection, the State Commission's basic legal and factual contentions are that on September 25, 2007, Judge Keller willfully refused to keep the CCA's clerk's office or the Court open past 5 p.m. despite the fact that she knew the following: (i) Mr. Marty's telephone call to her shortly before 5 p.m. on September 25, 2007 was about the execution that was scheduled that evening; (ii) the execution was scheduled to occur at 6 p.m.

that evening; (iii) certiorari had been granted in *Baze* that morning; (iv) a filing to prevent the execution based on the issue in *Baze* was likely to occur; (v) lawyers for the person scheduled to be executed wanted to file something with the CCA; (vi) the lawyers were not ready to file with the CCA by 5 p.m., and that (vii) the lawyers had requested that they be permitted to file after 5 p.m.

In addition, when Mr. Marty called Judge Keller shortly before 5 p.m. on September 25, 2007, and asked whether the CCA's clerk's office or the Court could stay open past 5 p.m., Judge Keller abruptly said "no". In addition, when Mr. Marty told Judge Keller that he was asking because "they wanted to file something but were not ready" Judge Keller again said "no" without further explanation or instruction. Judge Keller's instructions to Mr. Marty had the effect of closing any further access by Mr. Richard's lawyers with the CCA concerning the effort to obtain a stay of Mr. Richard's execution based on the legal issue for which the USSC had granted certiorari that very day.

Based on Judge Keller's abrupt reply, Mr. Marty (who was under the incorrect impression that because the decision had been made to close the CCA's clerk's office or Court at 5 p.m., the CCA judges would not accept pleadings from Mr. Richard's lawyers after 5 p.m. that day) told Mr. Abel Acosta in the CCA's clerk's office not accept a filing after 5:00 p.m. Consequently, Mr. Acosta told Mr. Richard's legal team that the decision had been made that no filing would be accepted after 5 p.m., and when the legal team called to say that they were coming to hand deliver paperwork to the CCA after 5 p.m., Mr. Acosta told them not to bother because no one was there to accept the filing. Mr. Acosta also told Mr. Richard's legal team they could not e-mail the filing to the CCA because the decision had already been made not to accept a filing after 5 p.m.

INTERROGATORY NO. 6:

Describe each action by Respondent on September 25, 2007 that cast public discredit on the judiciary or the administration of justice.

ANSWER:

The State Commission objects to this interrogatory on the ground that it exceeds the scope of permissible discovery under Rule 197 of the Texas Rules of Civil Procedure to the extent it fails to seek a specific legal or factual basis, in general terms, of the State Commission's claims or defenses. An interrogatory may not be used to require the responding party to marshal all of its available proof it intends to use at trial.

Subject to and without waiving this objection, the State Commission's basic legal and factual contentions are that Judge Keller's actions on September 25, 2007 cast public discredit on the judiciary and/or the administration of justice when she failed to follow the CCA's Execution - Day Procedures as described in response to Interrogatory No. 3.

In addition, the State Commission contends that Judge Keller's actions on September 25, 2007 cast public discredit on the judiciary and/or the administration of justice when, after speaking with Mr. Marty shortly before 5 p.m., she (a) refused to keep the CCA's clerk's office or the Court open past 5 p.m.; (b) failed to clarify the reasons why Mr. Marty was asking her whether the CCA's clerk's office or the Court could stay open past 5 p.m.; (c) failed to raise any concern about Mr. Richard's lawyers' ability to get their paperwork to the CCA judges; (d) failed to accommodate Mr. Richard's legal team's situation, and (e) failed to take any steps to require Mr. Marty to comply with the Execution – Day Procedures or to herself relay the communications to the assigned judge despite knowing that: (i) Mr. Marty's call was about the execution that was scheduled that evening; (ii) the execution was scheduled to occur at 6 p.m. that evening; (iii) certiorari had been granted in *Baze* that morning; (iv) a filing to prevent the execution based on the issue in *Baze* was likely to occur; (v) lawyers for the person scheduled to be executed wanted to file something with the CCA; (vi) the lawyers were not ready to file with the CCA by 5 p.m., and that (vii) the lawyers had requested that they be permitted to file after 5 p.m. In addition, Judge Keller knew that it had been common in the past to receive late filings on execution days after the clerk's office closed, and she knew that the Execution – Day Procedures called for the designated judge to remain available after hours to receive last-minute communications regarding the scheduled execution.

INTERROGATORY NO. 7:

Explain in detail how Respondent on September 25, 2007 failed to perform her duties as Presiding Judge.

ANSWER:

The State Commission objects to this interrogatory on the ground that it exceeds the scope of permissible discovery under Rule 197 of the Texas Rules of Civil Procedure to the extent it fails to seek a specific legal or factual bases, in general terms, of the State Commission's claims or defenses. An interrogatory may not be used to require the responding party to marshal all of its available proof it intends to use at trial.

Subject to and without waiving this objection, the State Commission's basic legal and factual contentions are that on September 25, 2007, Judge Keller failed to perform her duties as a judge by failing to follow the CCA's Execution – Day Procedures as described in response to Interrogatory No. 3.

The State Commission also contends that on September 25, 2007, Judge Keiler's failed to perform her duties as a judge when, after speaking to Mr. Marty shortly before 5 p.m., she (a) failed to clarify the reasons why Mr. Marty was asking her whether the CCA's clerk's office or the Court could stay open past 5 p.m.; (b) failed to accommodate Mr. Richard's legal team's situation, and (c) failed to take any steps to require Mr. Marty to comply with the Execution – Day Procedures or to herself relay the communications to the assigned judge despite knowing that (i) Mr. Marty's call was about the execution that was scheduled that evening; (ii) the

execution was scheduled to occur at 6 p.m. that evening; (iii) certiorari had been granted in *Baze* that morning; (iv) a filing to prevent the execution based on the issue in *Baze* was likely to occur; (v) lawyers for the person scheduled to be executed wanted to file something with the CCA; (vi) the lawyers were not ready to file with the CCA by 5 p.m.; and that (vii) the lawyers had requested that they be permitted to file after 5 p.m.

INTERROGATORY NO. 8:

Describe each action by Respondent on September 25, 2007 that was clearly inconsistent with the proper performance of her duties as Presiding Judge.

ANSWER:

The State Commission objects to this interrogatory on the ground that it exceeds the scope of permissible discovery under Rule 197 of the Texas Rules of Civil Procedure to the extent it fails to seek a specific legal or factual basis, in general terms, of the State Commission's claims or defenses. An interrogatory may not be used to require the responding party to marshal all of its available proof it intends to use at trial.

Subject to and without waiving this objection, please see the answer to Interrogatory No. 7, which is incorporated herein.

INTERROGATORY NO. 9:

Explain in detail how Respondent on September 25, 2007 was incompetent in the performance of her duties.

ANSWER:

The State Commission objects to this interrogatory on the ground that it exceeds the scope of permissible discovery under Rule 197 of the Texas Rules of Civil Procedure to the extent it fails to seek a specific legal or factual basis, in general terms, of the State Commission's claims or defenses. An interrogatory may not be used to require the responding party to marshal all of its available proof it intends to use at trial.

Subject to and without waiving this objection, the State Commission's basic legal and factual contentions are that on September 25, 2007, Judge Keller was incompetent in the performance of her duties when she failed to follow the CCA's Execution – Day Procedures as described in response to Interrogatory No. 3.

The State Commission also contends that on September 25, 2007, Judge Keller was incompetent in the performance of her duties, when after speaking with Mr. Marty shortly before 5 p.m. on September 25, 2007, she (a) failed to clarify the reasons why Mr. Marty was asking her whether the CCA's clerk's office or the Court could stay open past 5 p.m.; (b) failed to accommodate Mr.

Richard's legal team's situation, and (c) failed to take any steps to require Mr. Marty to comply with the Execution - Day Procedures or to herself relay the communications to the assigned judge despite knowing that: (i) Mr. Marty's call was about the execution that was scheduled that evening; (ii) the execution was scheduled to occur at 6 p.m. that evening; (iii) certiorari had been granted in *Baze* that morning; (iv) a filing to prevent the execution based on the issue in *Baze* was likely to occur; (v) lawyers for the person scheduled to be executed wanted to file something with the CCA; (vi) the lawyers were not ready to file with the CCA by 5 p.m., and that (vii) the lawyers had requested that they be permitted to file after 5 p.m.

INTERROGATORY NO. 10:

Describe each action by Respondent on September 25, 2007 that constitutes incompetence in the performance of her duties of office.

ANSWER:

The State Commission objects to this interrogatory on the ground that it exceeds the scope of permissible discovery under Rule 197 of the Texas Rules of Civil Procedure to the extent it fails to seek a specific legal or factual basis, in general terms, of the State Commission's claims or defenses. An interrogatory may not be used to require the responding party to marshal all of its available proof it intends to use at trial.

Subject to and without waiving this objection, please see the answer to Interrogatory No. 9, which is incorporated herein.

INTERROGATORY NO. 11:

Explain whether you contend that Respondent, on any date other than September 25, 2007, cast public discredit on the judiciary or the administration of justice and, if so, how.

ANSWER:

At this time, the State Commission's complaints are specific to the circumstances surrounding the September 25, 2007 Richard execution. Nonetheless, the State Commission reserves its right to amend its First Amended Notice of Formal Proceedings to add any additional charges as a result of information learned during the discovery process.

INTERROGATORY NO. 12:

Explain whether you contend that Respondent, on any date other than September 25, 2007, failed to perform her duties as Presiding Judge and, if so, how.

ANSWER:

At this time, the State Commission's complaints are specific to the circumstances surrounding the September 25, 2007 Richard execution. Nonetheless, the State Commission reserves its right to amend its First Amended Notice of Formal Proceedings to add any additional charges as a result of information learned during the discovery process.

INTERROGATORY NO. 13:

Explain whether you contend that Respondent, on any date other than September 25, 2007, was incompetent in the performance of her duties and, if so, how.

ANSWER:

At this time, the State Commission's complaints are specific to the circumstances surrounding the September 25, 2007 Richard execution. Nonetheless, the State Commission reserves its right to amend its First Amended Notice of Formal Proceedings to add any additional charges as a result of information learned during the discovery process.

INTERROGATORY NO. 14:

Explain in detail how the formal proceeding against Respondent preserves public confidence in the judiciary.

ANSWER:

The State Commission objects to this request on the ground that it is overly broad and vague. The State Commission further objects to this request on the ground that it is not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 15:

Please identify the name, address and phone number of any witnesses you intend to call at the hearing for the removal of Respondent.

ANSWER:

The State Commission objects to this request to the extent it seeks information related to rebuttal or impeachment witnesses. As exempted from discovery by Rule 192.3(d), any rebuttal or impeaching witnesses cannot reasonably be anticipated before trial.

Subject to and without waiving the foregoing, the State Commission may call one or more of the following witnesses:

Judge Sharon Keller
c/o Chip Babcock
JACKSON WALKER, LLP
1401 McKinney Street, Suite 1900
Houston, Texas 77010
Direct: 713.752.4210
(713) 752-4200 Telephone
(713) 752-4221 Fax
cbabcock@jw.com

Judge Cheryl Johnson
Mr. Abel Acosta
Texas Court of Criminal Appeals
201 W. 14th Street
Austin, Texas 78701
(512) 463-1597 Telephone

Mr. Rick Wetzel
1411 West Avenue Suite 100
Austin, TX, 78701
(512) 469-7943

Mr. Edward Marty
545 CR 239
Gatesville, TX , 76528

Ms. Dorinda Fox
Ms. Melissa Waters
Texas Defender Services
c/o SUSMAN GODFREY, LLP
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
(713)-653-7827 Telephone
(713) 654-3380 Fax
nmanne@susmangodfrey.com

Ms. Araceli Sepulveda (as possible rebuttal witness)
c/o SUSMAN GODFREY, LLP
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
(713) 653-7827 Telephone
(713) 654-3380 Fax
nmanne@susmangodfrey.com

Jan E. Smith/Pam Menke
Graves, Dougherty, Hearon & Moody
401 Congress Ave., Suite 2200
Austin, Texas 78701
(512) 480-5600 Telephone
(512) 478-1976 Fax

Professor Jordan M. Steiker
University of Texas School of Law
727 E. Dean Keeton Street
Austin, TX 78705
(512) 232-1346 Telephone

VERIFICATION

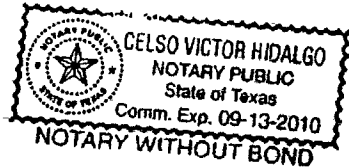
STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority on this day personally appeared Seana Willing, known to me to be the person whose name is subscribed to the foregoing instrument, who having been duly sworn, on oath, deposed and said that he/she has read the foregoing First Amended Answers to Interrogatories and that the answers to these Interrogatories are true and correct based upon her personal knowledge or information obtained from other persons.

Seana Willing
Executive Director, Affiant
State Commission on Judicial Conduct

SUBSCRIBED TO AND SWORN TO before me on this 8 day of July, 2009.

Celso Victor Hidalgo
Notary Public In and For the State of Texas



RB

TEXAS CIVIL RIGHTS PROJECT

Michael Tigar Human Rights Center
1405 Montopolis Drive Austin, Texas 78741-3438
(512) 474-5073 (phone) (512) 474-0726 (fax)

James C Harrington
Director

Wayne Krause
Senior Staff Counsel

Sheri Joy Nasye Tolliver
Isaac F. Harrington
Scott C. Medlock
Attorneys

Received by _____

15 October 2007

OCT 18 2007

State Commission on Judicial Conduct
PO Box 12265
Austin, TX 78711-2265

STATE COMMISSION
ON JUDICIAL CONDUCT

Re: CIC No.: 08-0079-AP
Judge Sharon Keller (Presiding Judge, Texas Court of Criminal Appeals)

Amended Complaint with additional signatories and supplemental legal authority

Dear Members of the Commission:

We wish to file a formal complaint against Judge Sharon Keller (Presiding Judge, Texas Court of Criminal Appeals) and ask that you take appropriate, immediate, and severe disciplinary action. The Texas Civil Rights Project is a nonprofit foundation that promotes civil rights and economic and racial justice throughout Texas.

SUMMARY STATEMENT

This complaint involves a situation in which Judge Keller refused to allow the attorneys for Michael Richard, scheduled to be executed on the same day, to file pleadings on his behalf, based on a grant of certiorari by the U.S Supreme Court that same day on the question of the constitutionality of lethal injection. The attorneys had requested that the court clerk's office remain open twenty minutes past the 5pm closing time because they had experienced computer failure in the preparation of their pleading. Judge Keller refused the request, even though she was not the judge assigned to the *Richard* case. As a result, Richard then was executed by lethal injection.

Judge Keller's actions denied Michael Richard two constitutional rights, access to the courts and due process, which led to his execution. Her actions also brought the integrity of the Texas judiciary and of her court into disrepute and was a source of scandal to the citizens of the state.

FACTS

Court of Criminal Appeals judges were standing by on September 25 to work the evening on which Michael Richard was executed because they expected his lawyers (one of whom was the distinguished University of Houston law professor David Dow) to file an emergency appeal based on the U.S. Supreme Court's decision earlier in the day to consider a Kentucky case challenging the constitutionality of lethal injection. Without a ruling by the Texas Court of Criminal Appeals on Richard's appeal, the U.S. Supreme Court could not consider his appeal or a request to stay his execution, pending a Supreme Court decision.

At least three judges were working in the courthouse at the time, including the judge assigned to the Richards case, and others were available by phone, if needed, according to court personnel. However, unbeknownst to them, Presiding Judge Keller refused to allow the emergency 11th-hour appeal to be filed after 5pm. Richard's lawyers had requested the court clerk to stay open for an extra twenty minutes so they could file their petition for stay of execution. They had experienced severe computer problems in preparing the pleading and so informed the clerk. Judge Keller refused the request, and Richard was put to death.

Neither Judge Keller nor the court's general counsel, Edward Marty, who had consulted with Judge Keller on the request to stay open, advised any of the judges of the request by Richard's attorneys. More pointedly, Judge Keller did not consult Judge Cheryl Johnson, who was assigned the case and who Judge Keller has acknowledged was at the court at the time. Marty himself shares culpability, because from calls earlier in the day from Richard's counsel, he was aware of the pending appeal and that it would be coming in to the court later in the day.

According to undisputed press accounts, Judge Cathy Cochran said, "There were plenty of judges here, and there were plenty of other personnel here. A number of judges stayed very late that evening, waiting for a filing from the defense attorney." She said she herself had gone home, but was available by telephone. Judge Cochran said, at the least, a decision should have been made by the full court on whether to accept the appeal. "I would definitely accept anything at any time from someone who was about to be executed," she said.

Judge Paul Womack said, "All I can tell you is that night I stayed at the court until 7 o'clock in case some late filing came in. I was under the impression we might get something."

Judge Keller's response is unfathomable in view of the fact that Richard's attorneys David Dow, who runs the Texas Innocence Network at the University of Houston Law Center, and his colleagues had to decide legal strategy and craft a filing as to how the case before the Supreme Court applied to Richard's situation, all in less than one day, and on the day of the Supreme Court decision itself.

The computer problem was exacerbated because the Court of Criminal Appeals, unlike other courts, does not accept filings by e-mail. If it had, Prof. Dow and his colleagues would have met the 5pm deadline because it was printing the filing that took extra time. The lawyers needed about another 20 minutes.

Judge Johnson, when she read about the request to stay open past 5pm in an *Austin American-Statesman* story the following day, said her reaction was "utter dismay. And I was angry. If I'm in charge of the execution, I ought to have known about those things; and I ought to have been asked whether I was willing to stay late and accept those filings." Judge Johnson would have accepted the brief for consideration by the court. "Sure," she said. "I mean, this is a death case."

Judge Cochran also said the Richard case raised troubling questions. "First off, was justice done in the Richard case? And secondly, will the public perceive that justice was done and agree that justice was done? Our courts should be open to always redress a true wrong, and as speedily as possible. That's what courts exist for."

Rather amazingly, Judge Keller has voiced no second thoughts in the weeks following her decision. In fact, her rather implausible response has been, "...I think the question ought to be why didn't they file something on time? They had all day." Judge Keller has defended her actions, denying she was informed of any reason behind the request to stay open and saying she was enforcing the court's longstanding practice to close on time.

As a result of Judge Keller's actions, Richard was executed by lethal injection and denied the opportunity seek a stay for the U.S. Supreme Court. Judge Keller's actions denied Michael Richard two constitutional rights, access to the courts and due process, which led to his execution. Her actions also brought the integrity of the Texas judiciary and of her court into disrepute and was a source of scandal to the citizens of the state and of the country.

CONSTITUTIONAL RIGHTS IMPLICATED

Texas Constitution, Article I, Section 13:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Texas Constitution, Article V, Section §1-a:

(6) A. Any Justice or Judge of the courts established by this Constitution ... may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section.... On the filing of a sworn complaint charging a person holding such office with willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit on the judiciary or on the administration of justice, the Commission, after giving the person notice and an opportunity to appear and be heard before the Commission, may recommend to the Supreme Court the suspension of such person from office. The Supreme Court, after considering the record of such appearance and the recommendation of the Commission, may suspend the person from office with or without pay, pending final disposition of the charge.

U.S. Constitution, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These constitutional rights have specific applicability with regard to Canon 3(A)(8), which follows.

APPLICABLE CANONS

Judge Keller's actions appear to have violated at least four provisions of the Texas Code of Judicial Conduct and the goals set forth in the Preamble:

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Canon 1: Upholding the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 2: Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

B. Adjudicative Responsibilities.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law....

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

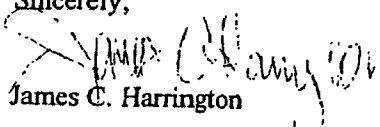
Witnesses:

Hon. Sharon Keller (Presiding Judge, Texas Court of Criminal Appeals)
Hon. Cathy Cochran (Judge, Texas Court of Criminal Appeals)
Hon. Paul Womack (Judge, Texas Court of Criminal Appeals)
Hon. Cheryl Johnson (Judge, Texas Court of Criminal Appeals)
Hon. Tom Price (Judge, Texas Court of Criminal Appeals)
Edward Marty (General Counsel, Texas Court of Criminal Appeals)
Clerk, Texas Court of Criminal Appeals
Professor David Dow (Texas Innocence Network, University of Houston Law Center)
Andrea Keilen (Executive Director, Texas Defender Service)
James C. Harrington (Director, Texas Civil Rights Project)

We ask that the Commission determine the underlying facts and, if they are similar to the facts described above and in news accounts, ask that you take appropriate disciplinary action, as required by Article V, Section §1-a of the Texas Constitution.

Thank you for your attention to this matter. We look forward to hearing back from you.

Sincerely,


James C. Harrington

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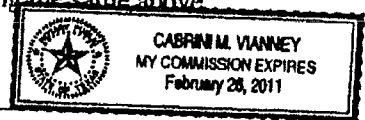
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Sworn to and subscribed before me, the undersigned authority, on this 15th day of October 2007, by James C. Harrington, known to me to be the person signing the same above.



Cabrini Vianney
Notary Public in and for
The State of Texas



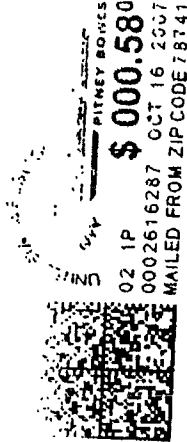
Texas Civil Rights Project
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
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CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature]

MARSHA RICHARD,	§	
	§	
PLAINTIFF,	§	
	§	
DOREEN ANDERSON,	§	
	§	
INTERVENOR-PLAINTIFF,	§	
	§	
V.	§	CAUSE NO. A-07-CA-946-LY
	§	
HONORABLE SHARON KELLER,	§	
INDIVIDUALLY AND IN AN OFFICIAL	§	
CAPACITY AND JOHN DOES,	§	
INDIVIDUALLY AND IN AN OFFICIAL	§	
CAPACITY,	§	
	§	
DEFENDANTS.	§	
	§	

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS

Before the Court are Defendant Keller's Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6) for Failure to State a Claim and 12(b)(1) for Lack of Jurisdiction filed December 13, 2007 (Clerk's Document 8), Keller's Advisory to the Court on Motion to Dismiss filed March 25, 2008 (Clerk's Document 36), Defendant Keller's Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6) for Failure to State a Claim and 12(b)(1) for Lack of Jurisdiction filed March 26, 2008 (Clerk's Document 37), Plaintiff-Intervenor's Response to Defendant's Motion to Dismiss filed April 15, 2008 (Clerk's Document 40), Plaintiff Richard's Response to Defendants' Motion to Dismiss filed April 18, 2008 (Clerk's Document 41), Defendant Keller's Reply to Plaintiffs-Intervenors' Response to Judge Keller's Motion to Dismiss filed May 5, 2008 (Clerk's Document 45), Defendant Keller's Advisory to the Court of Supplemental Authority filed June 10, 2008

(Clerk's Document 46), Plaintiff-Intervenor's Opposed Motion to Take Limited Depositions, Pursuant to Local Rule CV-12, on Issue of Defendant Sharon Keller's Assertion of Immunity filed April 15, 2008 (Clerk's Document 39), and Defendant Keller's Response to Plaintiff-Intervenor's Opposed Motion to Local Rule CV-12, on Issue of Defendant Sharon Keller's Assertion of Immunity filed April 21, 2008 (Clerk's Document 42). By her March 25, 2008 advisory, Defendant Judge Sharon Keller informed the Court she planned to file an updated motion to dismiss and requested that the Court not rule on her December 13, 2007 motion to dismiss. Judge Keller filed her updated motion to dismiss on March 26, 2008. The Court will dismiss the originally filed motion. Having considered Judge Keller's currently pending motion to dismiss, the responses, the reply, the supplement, the applicable law, and the entire case file, the Court will grant Judge Keller's motion to dismiss because Judge Keller is entitled to judicial immunity, and Marsha Richard and Doreen Anderson (collectively, "Plaintiffs") have not alleged a case or controversy sufficient to merit equitable relief. The Court will dismiss Plaintiffs' claims against Judge Keller and Marsha Richard's claims against the John Does.¹

I. Background²

On the morning of September 25, 2007, the United States Supreme Court granted writ of

¹ Marsha Richard asserts "Defendant John Does are those state actors who by action or inaction along with Defendant Keller caused the Appeal not to be filed." The Does' interests are generally aligned with Judge Keller's interests and for ease of discussion they are subsumed in the Court's references to Judge Keller. When necessary, the Court refers to the Does. Anderson sues only Judge Keller.

² In considering the motions to dismiss, the Court accepts as true all facts alleged in Plaintiff's Second Amended Original Complaint and Plaintiff-Intervenor Doreen Anderson's First Amended Complaint in Intervention, the live complaints. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

certiorari in *Baze v. Rees*, 128 S.Ct. 372 (2008), to determine whether the method of lethal injection administered in Kentucky is constitutionally prohibited as cruel-and-unusual punishment. *See* U.S. Const. amend. VIII. Texas follows the same lethal-injection protocol as Kentucky. Marsha Richard and Anderson's decedent Michael Richard was scheduled to be executed by lethal injection the evening of September 25, 2007.³ That day, Michael Richard's attorneys, located in Houston, Texas, prepared a last-minute appeal and request for stay of execution for Michael Richard, which they planned to file that day in the Texas Court of Criminal Appeals in Austin, Texas.⁴ Judge Keller is the presiding judge of that court. The court of criminal appeals is the highest state court in Texas having jurisdiction over criminal cases and would have had to rule on Michael Richard's appeal before the United States Supreme Court could consider any appeal by Richard. Every other scheduled execution in the United States was stayed on September 25, 2007, following the Supreme Court's granting of the certiorari petition *Baze*.⁵ The State of Texas, however, executed Michael Richard the night of September 25, 2007.

Although this Court, for the purpose of considering Judge Keller's pending motions, takes as true Plaintiffs' pleaded allegations, separating factual allegations from conclusions is difficult. Marsha Richard asserts that Judge Keller "knowingly violated an alleged long standing unwritten

³ Marsha Richard was the wife of Michael Richard. Doreen Anderson is Michael Richard's daughter.

⁴ Michael Richard's attorneys intended to file both an appeal and a request for stay of execution. For ease of discussion, the court refers to both pleadings simply as the "appeal."

⁵ The Supreme Court rendered its decision on the merits in *Baze* on April 16, 2008, holding that Kentucky's three-drug lethal-injection protocol did not constitute cruel and unusual punishment that violated the Eighth Amendment of the Constitution. *See Baze v. Rees*, 128 S.Ct. 1520, 1534 (2008). Executions thereupon resumed.

policy that the assigned case judge—the Honorable Cheryl Johnson . . . receive all communications about a death penalty appeal and an alleged policy to accept death penalty appeals after 5:00 pm on execution days.” Anderson states, “[a]t least three Court of Criminal Appeals judges were working in the courthouse at the time, including the judge specifically assigned to the Richards [sic] case, Cheryl Johnson” The other judges, according to Anderson, were Texas Court of Criminal Appeals Judges Paul Womack⁶ and Cathy Cochran, who “allege they never heard about Richard’s attempt to appeal until after his execution.”

Anderson goes on to say that the

unwritten policies allegedly include that the judge assigned to handle the appeal, . . . Judge Johnson . . . , be notified of any communication from the condemned’s lawyers. The unwritten policies which Defendant Keller allegedly knew about, and that she was consciously indifferent to, allegedly state that the [court-of-criminal-appeals] judge assigned to a particular death penalty case should also stay on duty on the day of an execution until the execution occurs. Allegedly a policy existed that “all communications regarding the scheduled execution shall first be referred to the assigned judge.”

This Court presumes that because Michael Richard’s attorneys were in Houston and the court of criminal appeals is in Austin, telephonic communications between the two took place the day of the execution. Plaintiffs’ pleadings are vague, however, as to exactly who communicated and how any communications were conducted. Marsha Richards alleges, “[p]rior to 5:00 pm Michael’s attorneys made it clear to Defendant Keller, the clerk of the [court of criminal appeals], and possibly

⁶ Anderson quotes media accounts that Judge Womack stated, “[a]ll I can tell you is that night I stayed at the court until 7 o’clock in case some late filing came in. I was under the impression we might get something . . . ,” and Judge Cochran stated, “[t]here were plenty of judges here, and there were plenty of other personnel here. A number of judges stayed very late that evening, waiting for a filing from the defense attorney I would definitely accept anything at any time from someone who was about to be executed.”

others that the appeal paperwork was forthcoming but that, due to circumstances beyond their control, the paperwork would be filed a few minutes past 5:00 pm.”

Anderson asserts, “[Michael] Richard’s lawyers had requested the court clerk to stay open for an extra twenty minutes so they could file their petition for stay of execution. The attorneys had experienced severe computer problems in preparing the pleading, transmitting it from Houston to Austin, and downloading it, and so informed the clerk.” She further states that “[b]ecause from calls earlier in the day from Richard’s counsel, [court-of-criminal-appeals general-counsel Edward] Marty was aware of the pending appeal and the request for stay and that it would be coming in to the court later in the day, in the afternoon.”

Accepting these allegations as true, Judge Keller, general-counsel Marty, and the court clerk were all advised that Michael Richard’s attorneys would be filing appellate paperwork, including a motion for stay of execution, for Richard on September 25, 2007, shortly after 5:00 p.m.⁷ Plaintiffs’ complaints provide no further information regarding such conversations.

Lacking from the pleadings is any allegation that Judge Keller advised any attorney for Michael Richard that the court of criminal appeals would refuse a post-five-o’clock filing. Marsha Richard’s factual allegation is that “[o]n September 25, 2007, Defendant Keller allegedly ordered the clerk of the [court of criminal appeals] located in Austin, Texas not to accept any paperwork concerning Michael after 5:00 pm.”

Anderson’s factual allegations provide somewhat more: (1) “unbeknownst to [Judges Johnson, Womack, and Cochran] . . . , Judge Keller refused to allow the emergency 11th-hour appeal

⁷ On September 25, 2007, the Texas Court of Criminal Appeals did not accept filings electronically. The court now accepts electronic filing in capital cases.

and request for stay to be filed after 5:00pm [sic]{}"; (2) "Judge Keller refused the request [to file after 5:00 p.m.], and [Michael] Richard was put to death[]"; (3) "Defendant Keller's administrative decision to close the clerk's office was arbitrary and capricious and contrary to the long-standing practice of the Court."

Distilled and stated most favorably to non-movants Marsha Richard and Anderson, the pleaded facts of this case are as follows. Judge Keller ordered the clerk of the court of criminal appeals to close the clerk's office at 5:00 p.m. on September 25, 2007. Her action prevented Michael Richard's attorneys from filing an appeal of Richard's death sentence and request for a stay of execution. As a direct consequence of her action, Richard was executed. Judge Keller did not advise any other judge of the court of criminal appeals of her action. In taking the action, Judge Keller violated internal court-of-criminal-appeals operating procedures.

Marsha Richard brings her action under Texas's wrongful-death and survival statutes against Judge Keller, seeking to vindicate Michael Richard's constitutional rights pursuant to Section 1983 of the Civil Rights Act of 1871 (Section 1983). 42 U.S.C. § 1983. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 71.002, .021 (West 2008). Marsha Richard sued Judge Keller in her individual and official capacities, alleging Judge Keller's actions violated Michael Richard's rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution as well as guarantees of the Texas Constitution. *See* U.S. Const. amends. IV, V, VIII, and XIV. Marsha Richard further alleges a Section 1983 conspiracy between Judge Keller and the Does, and also alleges state-law claims for intentional infliction of emotional distress and assault and battery. *See Spear v. Town of W. Hartford*, 954 F.2d 63, 68 (2d Cir. 1992). Marsha Richard seeks actual and punitive damages, declaratory and injunctive relief, and attorney's fees.

Doreen Anderson intervened, invoking Texas's wrongful-death and survival statutes to bring constitutional claims against Judge Keller. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 71.002, .021. Specifically, Anderson claims Judge Keller violated Michael Richard's Eighth Amendment right not to be subjected to cruel-and-unusual punishment, his Fourteenth Amendment right not to be deprived of life without due process, and the open-courts provision of the Texas Constitution. *See* U.S. Const. amends. VIII, XIV; Tex. Const. art. I, § 13. Anderson seeks punitive damages and a declaratory judgment.

Judge Keller filed a motion to dismiss Marsha Richard's Second Amended Original Complaint and Anderson's First Amended Complaint in Intervention. Judge Keller argues she is entitled to judicial immunity. In the alternative, Judge Keller argues she is entitled to sovereign and Eleventh Amendment immunity. *See* U.S. Const. amend. XI. Judge Keller further argues Plaintiffs fail to allege facts that state Due Process, Equal Protection, Eighth Amendment, or Fourth Amendment constitutional violations, and fail to allege facts that state a conspiracy claim under the Civil Rights Act. Judge Keller also argues that in the event this Court finds Plaintiffs have pleaded constitutional violations or a conspiracy, Judge Keller is entitled to qualified immunity because her actions were objectively reasonable and no clearly established law precluded her actions. Judge Keller further argues Plaintiffs have not shown violations of state law. Because the Court concludes Judge Keller is entitled to judicial immunity, the Court need not, and does not, address Judge Keller's other arguments.

II. Analysis

A. 12(b)(6) Standard of Review⁸

The Court construes a plaintiff's complaint liberally in the plaintiff's favor, and all facts pleaded are taken as true. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). A complaint is sufficient if it gives the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. See *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Dismissal for failure to state a claim is inappropriate unless the plaintiff's factual allegations fail to show a right to relief that is plausible and above mere speculation. See *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969. Although courts grant motions to dismiss infrequently, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 285 (5th Cir. 1993).

B. Judicial Immunity

Judges are generally absolutely immune from suit for damages, including suits brought under Section 1983. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *Mays v. Sudderth*, 97 F.3d 107, 111 (5th Cir. 1996). Absolute judicial immunity protects a judge's ability to proclaim the law "without apprehension of personal consequences to [her]self." *Stump v. Sparkman*, 435 U.S. 435, 349 (1977)

⁸ Judge Keller moves to dismiss Plaintiffs' complaints under both Federal Rule of Civil Procedure 12(b)(6) and 12(b)(1). A motion under 12(b)(1) attacks the Court's subject-matter jurisdiction over a case; sovereign and Eleventh Amendment immunities are often analyzed under a 12(b)(1) standard. See 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350, at 79 (2004). Judicial immunity, on the other hand, as a "built-in defense," is more appropriately analyzed under a 12(b)(6) standard. *Id.* § 1357, at 713, 722.

(quoting *Bradley v. Fisher*, 13 Wall. 335, 347 (1872)); see also *Ballard v Wall*, 413 F.3d 510, 515 (5th Cir. 2005). A judge's duties make her particularly vulnerable to lawsuits from vexed litigants, as she must exercise discretion to make potentially controversial decisions. See *Forrester v. White*, 484 U.S. 219, 226-27 (1987). "Only a hero could exercise an unfettered judgment while facing, day after day and case after case, the prospect of personal ruin implicit in permitting every losing party to sue [her] for damages . . . a sound policy must deal with the prospect that some who occupy the bench may not be of that ilk." *Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976, 979-80 (5th Cir. 1979) (*en banc*). Judicial immunity is immunity from suit, not just damages, and therefore applies despite allegations of malice or corruption. *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (*per curiam*). Even grave procedural errors do not overcome judicial immunity. *Stump*, 435 U.S. at 359; *Brandley v. Keeshan*, 64 F.3d 196, 200 (5th Cir. 1995).

Judicial immunity does not apply if the judge acted outside her judicial capacity or if the judge acted in the absence of jurisdiction. *Id.* at 11-12. In determining whether a judge's act was judicial in nature, courts use a functional approach, which emphasizes the policy behind judicial immunity. Judicial immunity exists to protect the public and protect the integrity of the judicial system generally, not to protect the specific judge in question. See *Forrester*, 484 U.S. at 224, 227; *Pierson*, 386 U.S. at 554. Therefore, an act is not judicial simply because a judge performed it, and the Court must distinguish between judicial and administrative, legislative, or executive acts. *Forrester*, 484 U.S. at 227-29.

In determining whether a complained-of act occurred in a judge's judicial capacity, a district court must consider four factors:

- (1) whether the precise act complained of is a normal judicial

function; (2) whether the act[] occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose out directly out of a visit to the judge in [her] official capacity.

Ballard v. Wall, 413 F.3d 510, 515 (5th Cir. 2005), quoting *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993); see also *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972). Significantly, “[t]hese factors are broadly construed in favor of immunity.” *Ballard*, 413 F.3d at 510 (emphasis added), citing *Malina*, 994 F.2d at 1124. Immunity may be afforded in the absence of one or more of these factors. *Malina*, 994 F.2d at 1124, citing *Adams v. McIlhaney*, 764 F.2d 294, 297 (5th Cir. 1985).⁹

For purposes of absolute immunity, a judge has jurisdiction if the court has some subject-matter jurisdiction. *Adams*, 764 F.2d at 298. Actions taken in excess of jurisdiction do not deprive a court of jurisdiction, only actions taken in the “absence” of jurisdiction do. *Stump*, 435 U.S. at 357 n.7.

C. Application

Before applying the judicial-capacity factors, this Court must determine what Judge Keller did or did not do. Plaintiffs' factual allegations provide little guidance. They are silent as to specific statements attributed to any of Michael Richard's appellate attorneys concerning specific contact with any identified person at the court of criminal appeals. The Court thus presumes that any contact was by telephone and was between an attorney for Michael Richard and Judge Keller, general-counsel Marty, or the court clerk or an employee in the court clerk's office. The Court further

⁹ These factors have been referred to both as the “*McAlester* factors,” see *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993); *Adams v. McIlhany*, 764 F.2d 294, 297 (5th Cir. 1985), and the “*Malina* factors.” see *Ballard v. Wall*, 413 F.3d 510, 517 (5th Cir. 2005).

presumes that if the contact was not with Judge Keller personally, she either authorized or specifically directed the response to any inquiry by an attorney for Michael Richard. The Court also presumes that Judge Keller did not advise any other judge of the Texas Court of Criminal Appeals of such contact. Indulging in these presumptions, Plaintiffs' allegations, if taken as true, are that Judge Keller ordered the clerk's office not to extend its hours of operation past 5:00 p.m. on September 25, 2007, in spite of her knowledge that Michael Richard's attorneys desired to file an appeal of Richard's death sentence that day before his scheduled execution.

What is lacking from Plaintiffs' allegations is any allegation that there was an actual attempt on September 25 to *file* anything with the court of criminal appeals. In Texas, a document is deemed filed with the court of criminal appeals by delivering the document to either to the clerk of the court or a judge of the court. Tex. R. App. P. 9.2(a). A physical location is not specified. Plaintiffs posit neither that Michael Richard's attorneys attempted to deliver an appeal or stay to the clerk or a judge, or that any attorney attempted to contact a judge of the court to accept delivery.

Anderson argues "Judge Keller obstructed and refused to follow the court's own procedures . . . [h]er conduct is not entitled to judicial immunity because such egregious action and obstruction is not within a judge's normal function." Marsha Richard asserts that Judge Keller's actions were not judicial and that Judge Keller's actions were administrative, ministerial, or *ultra vires*. In light of these allegations, the Court will consider the judicial-capacity factors in turn.

The first judicial-capacity factor inquires as to whether the precise act complained of was a normal judicial function. *See Ballard*, 413 F.3d at 515. Accepting a tendered document for filing is a normal judicial function. *See Tex. R. App. P. 9.2(a)*. The converse must likewise be true—refusing to accept a document is a judicial function. At worst, Judge Keller caused a document

to not be accepted for filing, a clearly judicial function.

The second factor is also met. Judge Keller's actions, if any, occurred within the confines of the court of criminal appeals. There is no allegation they did not. Judge Keller, from the court in Austin, either spoke with an attorney for Michael Richard or, while at the court, instructed the court's general counsel or clerk to act or refrain from acting in the manner alleged by Plaintiffs. In any event, any action of Judge Keller alleged by Plaintiffs occurred on the premises of the court of criminal appeals, clearly an adjunct space to the court's courtroom. *See Ballard*, 413 F.3d at 515.

Regarding the third factor, the Court inquires whether the controversy centered around a case pending before the court. The Court here presumes that there was no pending matter before the court of criminal appeals pertaining to Michael Richard at the time of the activities giving rise to this controversy. Indeed, it appears that the controversy centers around *whether* there would be an appeal before the court of criminal appeals by Richard. The parties agree that the documents Richard's attorneys indicated they wished to file involved matters which the court of criminal appeals could legally determine. In fact, all agree that the court of criminal appeals would of necessity have to consider Richard's allegations before he could further appeal to the Supreme Court of the United States. This Court holds that "pending before the court" may be construed to include all procedural matters necessary to bring an action before that court. *See id.* In Richard's case, the trial court had ruled; he could not proceed to the Supreme Court in the absence of court-of-criminal-appeals action. To fail to construe the third judicial-capacity factor in this manner would create a gap in the orderly proceeding from one court to the next. Such failure would also undermine broadly construing the factors to favor judicial immunity. *Id.* This Court holds that the third judicial-capacity factor has been met. *See id.*

Finally, this court must determine if the act alleged against Judge Keller arose "directly out of a visit to . . . [her] in [her] official capacity." *Id.* No physical visit to Judge Keller occurred. It is unclear whether there was a telephonic visit to her, as the contact with the court of criminal appeals might have occurred with someone other than her. Again, construing the judicial-capacity factors broadly and likewise construing Plaintiffs' allegations broadly, there was contact with the court of criminal appeals by an attorney for Michael Richard that was either directly with Judge Keller or set in motion a series of events leading to action by Judge Keller. This Court holds that, for purposes of determining whether a judge acted in her official capacity, the visit need not be face to face. *Cf. Adams*, 764 F.2d at 298 (party's letter to judge could be construed as "visit"; relevant factor was that correspondence was directed to judge in judge's official capacity). Here, Richard's attorneys initiated contact with the court of criminal appeals with regard to a filing they intended to make.

This Court construes the judicial-capacity factors in accordance with their underlying policy and holds that all indicate that the actions complained of in this case were judicial acts for the purpose of immunity analysis.

Judge Keller also had sufficient jurisdiction, as that term is used in judicial-immunity analyses, for her immunity to attach. The court of criminal appeals had subject-matter jurisdiction to accept Michael Richard's proposed filing. Tex. Const. art. 1, § 5(b) ("[t]he appeals of all cases in which the death penalty has been assessed shall be to the court of criminal appeals"). The court also had jurisdiction to deny the filing. Again, construing the pleaded facts most advantageously to Plaintiffs, this Court cannot hold that Judge Keller's conduct was in complete absence of all jurisdiction. *See Mireles*, 502 U.S. at 12; *Ballard*, 413 F.3d at 517; *Adams*, 764 F.2d at 298.

Because Judge Keller acted in her judicial capacity at all times relevant to the controversy before this Court, and because she did not act in the absence of all jurisdiction, Judge Keller is entitled to complete judicial immunity from suit for damages.

Judicial immunity applies equally to the Does named by Marsha Richard in her Second Amended Complaint. See *Trackwell*, 472 F.3d at 1247 (stating clerk shares judge's judicial immunity when clerk assists judge in discharge of judicial functions); *Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812, 815 (10th Cir. 1981) (dismissing action against state judges and their clerks based on judicial immunity).¹⁰

D. Equitable Relief

Marsha Richard requests that the Court render a declaratory judgment specifying her rights under the United States and Texas Constitutions. She also requests an injunction that would (1) prevent Defendants from interfering with appeal rights of the condemned; (2) enjoin Judge Keller, the Texas Court of Criminal Appeals, and the State of Texas from preventing filing of death-penalty appeals; and (3) require that all death-penalty appeal communications be directed to the judge assigned to such appeal. Anderson requests a declaratory judgment concerning each of Judge Keller's violations of law and specifying Michael Richard's rights.

Judicial immunity does not protect a judge from injunctive relief. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1983). However, Section 1983 only allows for injunctive relief if a "declaratory decree

¹⁰ Plaintiffs seek limited discovery "in support of [their] claim against Defendant Keller's assertion of immunity." Specifically, Plaintiffs seek the depositions of Judges Keller, Johnson, and Womack, court-clerk Alex Acosta, and general-counsel Marty. This Court has accepted as true, for purposes of today's rulings, all pleaded factual allegations of Plaintiffs and has held that Judge Keller is entitled to complete judicial immunity. All that could be accomplished by such discovery is to confirm what the Court has taken to be true. The Court will therefore deny the request.

was violated or declaratory relief [is] unavailable.” 42 U.S.C. § 1983; *Bauer v. Texas*, 341 F.3d 352, 357 (5th Cir. 2003). Marsha Richard has not alleged a declaratory decree was violated.

Regarding the availability of declaratory relief, Plaintiffs are only entitled to declaratory relief if they allege facts showing they are at substantial risk of suffering injury inflicted by Defendants in the future. 28 U.S.C. § 2201(a) (2006) (requiring “actual controversy” between parties); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983); *Bauer*, 341 F.3d at 358. Such injury must be actual and concrete, not hypothetical or speculative, and Plaintiffs “must allege facts from which the continuation of the dispute may be reasonably inferred.” *Bauer*, 341 F.3d at 358. “For a declaratory judgment to issue, there must be a dispute which ‘calls, not for an advisory opinion on a hypothetical basis, but for an adjudication of present right upon established facts.’” *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1976) (*per curiam*) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937)); *Bauer*, 341 F.3d at 358. For obvious reasons, Plaintiffs have not alleged, pursuant to their survival claims, that Michael Richard is at risk of suffering injury by Defendants in the future.¹¹ Plaintiffs have not alleged, pursuant to their wrongful-death claims, that they are at risk of suffering injury by Defendants in the future.¹² Plaintiff have therefore failed to allege a case or controversy sufficient to demonstrate Article III standing. See U.S. Const. art. III, sec. 2; *Lyons*, 461 U.S. at 111-12.

For the same reason, Plaintiffs’ argument that Defendants’ actions are capable of repetition

¹¹ A survival action is a personal-injury lawsuit brought on behalf of the heirs, legal representatives, and estate of an injured person despite that person’s death. Tex. Civ. Prac. & Rem. Code Ann. § 71.021. A survival action derives from the claim the decedent would have had if he had survived.

¹² A wrongful-death action allows a surviving spouse, children, and parents of a decedent to bring a lawsuit for actual damages arising from an injury that causes an individual’s death. Tex. Civ. Prac. & Rem. Code Ann. §§ 71.002; .004. As such, it seeks compensation for the spouse’s, children’s, or parents’ injuries.

yet evading review fails. "Capable of repetition yet evading review" is an established exception to the mootness doctrine; it applies when there is a likelihood that the challenged action is too short in duration to be fully litigated before its cessation or expiration, and it is reasonable to expect a plaintiff will be subject to the same action again. *Davis v. Federal Election Com'n*, 128 S.Ct. 2759, 2769 (2008). Marsha Richard points out that "stopping an appeal on execution night will result in the death of the aggrieved and possible barring [of] the case from review," which goes to the first capable-of-repetition-yet-evading-review requirement. Plaintiffs have failed to allege, however, that they will personally be subjected to this injury again. Plaintiffs' requests for declaratory relief must be dismissed. Section 1983 does not prevent injunctive relief against judicial officers when declaratory relief is unavailable. 42 U.S.C. § 1983. The Court holds declaratory relief is unavailable. However, the Court's holding that Marsha Richard fails to allege a case or controversy sufficient to obtain declaratory relief applies equally to her request for injunctive relief, and it must also be dismissed.

III. Conclusion

IT IS THEREFORE ORDERED that Defendant Judge Keller's Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6) for Failure to State a Claim and 12(b)(1) for Lack of Jurisdiction (Clerk's Document 37) is **GRANTED**, Plaintiff Marsha Richard's claims against Judge Keller and the John Does are **DISMISSED**, and Plaintiff-Intervenor Doreen Anderson's claims against Judge Keller are **DISMISSED**.

IT IS FURTHER ORDERED that Defendant Judge Keller's Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6) for Failure to State a Claim and 12(b)(1) for Lack of Jurisdiction (Clerk's Document 8) **IS DISMISSED**.

IT IS FURTHER ORDERED that Plaintiff-Intervenor's Opposed Motion to Take Limited Depositions, Pursuant to Local Rule CV-12, on Issue of Defendant Sharon Judge Keller's Assertion of Immunity (Clerk's Document 39) is **DENIED**.

SIGNED this 29th day of September, 2008.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE